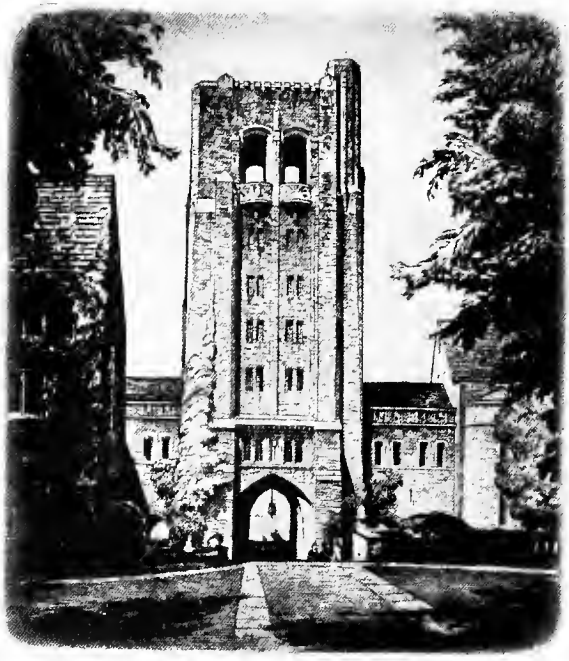

TRIAL TACTICS.

BY

ANDREW J. HIRSCHL,

OF THE CHICAGO BAR,

Author of "Combination of Corporations," and other books.

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To the Publisher of "Trial Tactics,"

Dear Sir: The book of Mr. Andrew J. Hirschl on "Trial Tactics" fills as far I know a distinct niche in legal literature.

Every law suit may be aptly compared to a drama in real life. This book gives a peep behind the scenes.

Every law suit may also be aptly compared to a battle. This book gives a view of the generalship on each side, conducted by the respective lawyers, and of the tactics by which battles are won and lost.

It is interesting to the general reader, and it is useful to all lawyers, but especially to the student and young practitioner, for in this book Mr. Hirschl has distilled the essence of a wide, varied and active practice of nearly thirty years. Very truly yours,

John F. Dillon.

195 *Broadway, New York, June* 28, 1906.

PREFACE.

The following chapters are not an attempt to formulate any fixed and definite rules or principles for the trials of causes. The art of trying causes is not gained from the statutes or the decisions or from any other such source, but chiefly if not altogether from experience.

The suggestions in the following pages are intended to help the student and young practitioner to gain success, should success be deserved, by profiting from the experience of others without suffering the accompanying disadvantages himself.

It is requested that the pages be read in succession from the beginning. The later ones presuppose a knowledge of what has preceded and may be unintelligible without it. The chapter heads and titles are not to be followed too closely, since they are at best but a broad designation of the subject matter.

ANDREW J. HIRSCHL.

INTRODUCTORY.

The skillful conduct of a trial may be compared somewhat to the jiu jitsu system of wrestling, which enables the inferior man, with less weight, less strength and less endurance to win because he knows better how to apply the weight and the strength that he does possess, while the heavier and stronger man loses because he does not know how to apply these forces at the right time or in the right manner. Law books contain decisions upon certain instructions, holding them technically right or wrong, but nowhere do these books indicate how to get those lawful and honorable advantages in the litigation which are a legitimate part of the lawyer's duty to his client. If one of the Seconds in a boxing match should neglect to take the choice corner and should set his man up with the strong sunlight in his eyes it would be considered gross negligence. In a law suit the lawyer is the Second. He must put his client in the right corner and to fail to do so is to subject himself to the charge of negligence.

If a client for instance is liable for a debt, but the statute of limitations has run against the

demand it is his lawyer's duty to plead the statute. To many this seems dishonorable because they think that if a man owes a debt he ought to pay it no matter how old it is, but it is the lawyer's duty to plead limitations and if he neglects to do so he would be responsible for the result.

There are other steps which must be taken in a case not so clear as pleading the statute of limitations, for the omission of which the attorney would be considered delinquent. These steps, or rather moves, are to be presently considered.

The matter of setting a case together is often as important as the case itself and it is honorable for a practitioner to use every reasonable and lawful advantage in this regard. If the lawyer on the other side is doing his duty, he is striving to do the same for his client. Each strives earnestly so far as he properly can in his direction, thus tending to hold the scales of justice in equipoise. Each should strive zealously but honorably in order to ensure a fair trial. If either neglects his part he is jeopardizing the interest of his client.

There are some judges on the bench who look upon themselves simply as umpires over a game of skill between the lawyers and not at all as the means of dispensing abstract and absolute

justice. Certainly before such judges, who are not few, the lawyer must avail himself of every technical point that can be made which is conducive to the success of the client, and of every legitimate and proper advantage that his skill enables him to take.

TRIAL TACTICS.

CHAPTER I.

SELECTION OF THE COURT.

ONE of the lawyer's first and most important duties is to choose the battleground. Where there is a choice he must see that his client gets the advantage. Part of the battleground, it may be said, is geographical and part chronological. Hence it is advisable to go to battle promptly unless in the nature of the case delay may be advantageous. Litigation should be brought early, not only on account of the statute of limitations, which may bar an action altogether if it is brought too late, but also because a prompt action appeals more to the court which tries the case, and to the jury if there is a jury. If a case is delayed in a lawyer's hands the assertion may afterwards be effectively made on the trial that the lawyer and client knew there was no case, otherwise they would not have waited so long in bringing the suit; which casts a suspicion over the case at once.

There are instances, of course, where delay is advisable, even in the bringing of the suit. An illustration may be a case that proves itself and is not susceptible of ready contradiction, or a case that is all documentary and can be won at any time unless it is overcome with affirmative evidence. It often may happen that the opponent will suffer by reason of the long delay because he loses his evidence. His witnesses may get away from him, they may die, they may turn hostile, thus if the litigation is long protracted and proves itself delay may be of benefit. This is a cold calculation but it is used.

A lawyer's duty, when a case is brought to him, is to make what the doctors call a careful diagnosis of it. This means that he must understand the case thoroughly, know exactly what the trouble is with his client, what his case is about, and as accurately as possible what his opponent's case is about. If he is to be the leader he must understand his client's case and his opponent's defense, or if the reverse is true, his opponent's case and his client's defense. Having analyzed that very carefully, having a correct diagnosis, the next step is to make a prognosis, to use another medical term. These are as important in law as in medicine and it is an attorney's duty to attend to them just as

much as it is the duty of the physician. The physician is often mistaken in inferences. He must not guess, he must know; if he acts on assumptions he may make a fatal error. A lawyer must look over his client's case or defense and must know absolutely where the trouble is and where it is going to be, in order to act understandingly.

Lawyers cannot rely simply upon the knowledge of the books. They must draw constantly upon experience and upon reasoning power. They must not rely too confidently upon a decision or set of decisions nor be too much alarmed by adverse decisions. They must analyze back of decisions and see what the law really is. This is well illustrated by a recent case which the judge decided in a certain way, insisting that he was bound by a prior decision. Upon appeal the cause was reversed, that court saying as to the prior decision simply "It is clearly erroneous in the text."

The elements then of the various matters and how best to make use of them call for earnest consideration. Law books may be likened to cook books. From the same recipe and the same ingredients one cook may produce a very delectable result but another produce something not fit to eat, because the one has had experience and the other has not.

At times a lawyer gains a great reputation, which is of course the legitimate ambition of every man, through being wise in the choice of his clientage. It is said of Abraham Lincoln that he would not take a case unless he felt confident that his side was the right one. He would examine the case confidentially when his clients and their witnesses came to his office and if he felt satisfied that the case was doubtful he would not take it. He had to be satisfied that it was a winning case before he would accept it. Naturally under these circumstances the chances were in his favor and he would win because in the course of time the jury began to think the case was right because Lincoln took it, and they would find for Lincoln. Possibly in the small community in which Lincoln practiced in those days a man might afford to take and even find it profitable to take that position. But it would be a very impracticable one in a large jurisdiction, say of two million people, because a lawyer might refuse clients for twenty years before any one discovered that a case which he accepted must in its nature be just. Further than that, it is the custom in some jurisdictions to ask the jurors whether they know or ever have known or even have heard of the lawyers. If any of them answers in the affirmative he is rejected. Circumstances alter cases, and a lawyer under

these conditions manifestly could not take the position of rejecting every case except those which he is bound to win.

It is not a lawyer's right or duty to take an improper case—that is, a case which is not lawful and honorable in every respect. It is his right and his duty to take any proper case, no matter if it is indeed very doubtful. And in the field of criminal law the weight of authority and of the best reasoners is that it is a lawyer's duty to defend the accused, if called upon by the latter so to do or if appointed by the Court, even if the lawyer himself believes the accused to be guilty. The defendant in a criminal case is entitled to a fair trial under the law of the land and it is a lawyer's duty to take his case if for no other reason than to prevent the possibility of an innocent person being convicted. There are cases on record of persons who have confessed guilt who in fact were innocent, who have been proved by absolutely incontrovertible testimony to have been innocent at the time they confessed guilt. So it is a matter of principle to take a criminal case, but in civil cases there ought of course to be a fair position to advocate for the plaintiff or for the defendant, otherwise it is not the duty of the lawyer to go on with it.

So long as a case can be fairly and honorably presented, even if it be very doubtful as to the

result, it is the duty of a lawyer to take it. The complications of our system leave it by no means clear in advance who is in the right of the case. It is only by means of a fair and honorable trial in the manner indicated, with an attorney on each side doing his best to develop that side of the case, that the correct result may ultimately be produced, and so the principle of refusing a case unless the lawyer is sure he is going to win is inapplicable.

A lawyer might be held negligent if he did not use these fair and proper advantages which have been referred to just as he might be held negligent if he did not interpose a legal and proper plea. Recently a case was affirmed because the lawyers had made a technical mistake in the bill of exceptions which prevented the case from being reviewed, and it was claimed that the lawyers should pay the amount of the judgment—some $12,000—because they had not protected their client. The time may come when the requirements upon the lawyers will go even beyond such plain things as pleas that ought to be put in and the proper way to prepare a bill of exceptions and errors in them may hold a lawyer for negligence.

What kind of action is to be brought depends greatly upon the nature of the case. Sometimes there are three or four alternatives open. Suit

may be brought in the Federal Court or in the State Court, in chancery or at law; before certain State judges or Courts or before others; or again, on behalf of his client a lawyer may refrain from suing at all but may lie by and wait until the other party sues him. All these things have to be carefully analyzed and a mistake in any one of them, while not so apparent as other possible mistakes, will reveal itself to an experienced critic.

In determining the choice of the battleground there are various considerations which must be borne in mind. The first thing to be decided is whether to go into any court at all. Suppose a litigation in regard to the ownership of an article. It is a homely saying but true that "possession is nine points of the law," so the side that has possession of the article would do well to stay out of court until they are brought in. There are instances where to sustain the burden of proof is very difficult for the litigant, perhaps impossible. The lawyer who can arrange to put the burden of proof upon his opponent has a great advantage. Take a case where people perish in a common disaster. A man and wife go to sea, the vessel sinks and both are drowned. The property belongs to the man. If he died first the wife gets the property and her heirs inherit it; but if the wife died first the

man's heirs get it. In a case like this whoever gets the property keeps it, compelling the other side to sue for it and establish their claim by proof, which is frequently an impossible thing to do.

Sometimes, however, it is of advantage to allow the other side to take the property and to sue, because, as will be developed more fully later, the plaintiff has a great advantage in jury cases by reason of the last speech to the jury, which is a most forceful weapon. In criminal cases, especially, it is probable that if the defendant's lawyer had the last speech to the jury there would seldom be a conviction. At all events it would have to be a very sure case. In any of the ordinary strong fighting cases the defendant would probably win if his lawyer had the last talk. So the last speech to the jury makes a wonderful difference.

The following case of a man who had 500 head of cattle and who gave a mortgage covering 400 of them to one man and to another a mortgage covering 450 of them was an instance of this advantage. A controversy resulted and the man having the first mortgage was wise enough to allow the other one to seize the cattle under his mortgage and go with them. The whole fight was eventually on the identification of the cattle, which is something very difficult to prove and

upon which, of course, ultimately many witnesses had to be called, developing much circumstantial evidence as well as direct evidence. So A allowed B to take the cattle and go away with them. Then A sued in trover, which gave him the last speech since he was the plaintiff and in that last speech, by reason of the shrewdness and eloquence of his counsel, he discounted B's witnesses and won the case; whereas if the situation had been reversed, if A had taken the cattle and B had sued in trover and had had the last speech he doubtless would have won the verdict.

So the shaping of the issue on a jury trial to see that his client gets the last speech is one of a lawyer's most important moves. To watch that, among other matters of study, cannot be impressed too forcibly upon the young practitioner. There are many instances on record where what was plainly the inferior side in right and law and morals and logic won because the lawyer spoke last to the jury.

Another matter for consideration is the question whether to go into a court of law which has a jury or into a court of chancery which has no jury.

It is a well-known precept of practice that a case which appeals to the sympathies should be shaped to get before a jury while a case or defense which repels the sympathies should be kept

away from the jury. An illustration will show how important this may be. There was a case of an old soldier who had bought some $400 worth of merchandise and had paid all but $50. Not having paid that, his creditor obtained a capias judgment before a justice of the peace and threw him into jail. Naturally much sympathy would be with the old man, because anybody would consider it hard to capias him on a claim of $50 after he had paid $350. The debtor stayed in jail three or four days, became crippled from rheumatism, obtained his release by writ of habeas corpus and sued for $25,000 damages. This was the case at law and when the lawyers came to defend the creditor in the damage suit they discovered, to their consternation, that the debtor had been in jail without any jurisdiction because the summons before the justice under which the execution was rendered failed to show service—that is, a service appeared on the summons but it had been stricken out. Hence, as it stood, there was no service. The case was there, $25,000, because the debtor had been in jail wrongfully. The execution was wrong because there was no proper judgment; the judgment was bad because there was no service of summons as the record stood. The creditor's attorneys in the damage suit of course were going to prove that there had been a service

of the summons but that someone had stricken it out. This they would have had to prove to the satisfaction of the jury, which would have been a very difficult thing to do because their sympathy for the debtor would have been so intense that they would disregard the evidence. What to do in such circumstances was the question, and the answer was to try to get the case into chancery. So the creditor's lawyer went into chancery on the theory that the return of the summons was a public record, that some intermeddler had defaced it and that chancery had jurisdiction to restore such record. Before the chancellor, there being no jury, and the chancellor not being much influenced by his sympathies, the creditor had a chance and actually got his public record restored. Having got it restored in chancery it was *res adjudicata* in the law suit. The debtor could no longer say there was no service. Being bound to admit there was service of course there was proper judgment; and being a proper judgment there was a proper execution; and the old man had no case.

The issue to be tried also admits of other manœuvring to get the lawful and proper advantage. Suppose, for instance, that the defendant's lawyer has a defense which is entirely affirmative. His client is sued for merchandise sold and delivered;

it is admitted that the client received the merchandise and that it actually was worth all that he is being sued for but the defense is that he has already paid for it, while the other side claims that he did not pay. Under those circumstances the defendant's lawyer would be guilty of an error if he should interpose "the general issue," because in interposing the general issue he would give the plaintiff the right to the opening and the close and thereby lose the advantage which has been referred to before. If the general issue is not interposed but simply the specific facts, admitting the entire claim of the plaintiff but asserting affirmatively that the debt has been paid or that there was damage because the goods were not up to the sample or any other such affirmative defense, if the case is properly framed when the jury is summoned the defendant's lawyer should at once say that he tenders the jury. This gives him the lead and if he claims it properly he gets the open and close and so obtains the advantage.

The best place in which to bring a litigation may involve, among other considerations, the state in which suit is to be brought. For instance a person living in Hoboken with his business in the City of New York, or a man living in Chicago who is in business in Hammond, Indiana, may be found going back and forth. The

laws of some states may be more favorable than those of other states in a particular kind of action, and in choosing the battleground it may be found advisable to bring the litigation in the one state rather than in the other. It may be advisable to bring the litigation in the Federal Court rather than in the State Court but the client may not be in a position to litigate in the Federal Court because he may be a citizen of the state in which his opponent is also a citizen and hence unable to go into the Federal Court. There are cases in which a client under these circumstances has moved into another state and acquired a residence in that state so that he could appear as a litigant in the Federal Court and jurisdiction was not denied. It might be considered questionable for a man to move into another state simply that he may become a citizen of that state and sue in the Federal Court, yet it must be admitted that if he actually moves nobody can attack the motives which induce him to move. One man may go to Colorado on account of the climate; another man may prefer the federal judicial system to that of the state. It is very doubtful whether the motive for removal can be attacked in any court.

These advantages to be gained may seem very technical and shrewd but it is to be questioned whether they are any more technical and shrewd

than other points in the law—the statute of limitations for instance, and other advantages that have been mentioned, which not only should be taken but which must be taken unless a lawyer would subject himself to criticism for negligence. So an important consideration is the selection of the place in which to bring the suit. In a case reported some years ago a bank of the City of Chicago brought suit in Connecticut involving some $30,000 or $40,000 and the question arose whether a party, who in this case happened to be a married woman, could be held liable. In some states it is very doubtful whether a married woman can be held for a note given for an indebtedness of her husband. Some states solve that question more technically than others. Sometimes the rules of evidence in one state are different from the rules of evidence in another state. In certain jurisdictions the wife cannot be a witness at all in any litigation against her husband; in other states a wife may be a witness as to some subject matter, for instance whatever occurred before her marriage to him; but she cannot be a witness in regard to transactions that occurred during the time she was married to him. In other states, again, she may be a witness in regard to transactions that occurred after she was divorced from him if there happens to be a divorce; but in some states

she cannot testify concerning anything that occurred at any time, even though she is called as a witness after divorce. This question may be very important if the litigation rests on the testimony of the wife, so if that kind of evidence is to be counted upon it would be advisable to ascertain what the law is in the different states if there is a choice of states.

Whether the form of action should be law or equity, has to be considered. There are some cases where a suit at law cannot be won because of lack of evidence, whereas a similar contention might be won in equity. That is, some matters can be brought in equity which cannot be brought in law. The ordinary definition of equity is that it is a system of jurisprudence which gives a remedy where the law is defective. But that is not a correct definition and is apt to mislead. Equity gives no remedy where the common law is defective because the very things that give no relief in law fail to relieve in equity. The proper definition is that equity gives a method of relief where the law would give relief if it could, but fails because it is defective in its method. Take a very simple illustration.

A homeless man is sitting on the doorstep of a rich man and is slowly freezing to death; the rich man refuses to let him in to warm and the poor man is crippled by the cold. If he sues

at law he cannot win because there is no action that he has a right to win. No matter how hard-hearted or cruel the other man man was the poor man had no right to go in and hence he could not recover at law. But neither could he sue in equity. He has no right and having no right he cannot get any remedy in either forum. If he had a right and through defect in the method could not find it in law he would have a remedy in equity. By the phrase right in law is meant right in a broad sense—not in the technical sense of the common law—in the broad sense of right of action, among the English speaking people, who have derived that from many minor sources, the decisions of the courts, the common understanding, the Bible, the civil law, and many other places which are supposed to be the sources of justice.

A fair illustration of an appeal to equity may be given. A man is a tenant of a house and it is agreed that he shall have a new lease. He expends a large amount of money on the house on the promise of a new lease but the landlord at the last minute, fails to give it to him and brings a suit at law to eject him. At law the tenant has no remedy and he would be put out. He is not allowed to testify that he ought to have a lease because that is a pure matter of equity. But he goes into equity and gets an injunction

against the landlord so that the landlord cannot put him out. On general principles of right and equity he has a right to a lease. He cannot enforce that right at law but he can in chancery.

In replevin it is the practice very often for a plaintiff, when it comes to the trial of his case, to allow himself to be non-suited. The statute says he may do so and when he is sued on the bond he sets up the defense of title, but the disadvantage of that is that his opponent obtains the first and the last speech in the suit on the bond, whereas, if he tries his replevin suit he obtains the first and last speech himself.

Suppose a case in which a man has obtained a large amount of property by alleged false pretenses. Now, fraud is hard to prove and must frequently be shown by circumstantial evidence. The man who commits a fraud is not very apt to publicly proclaim it, and his associates are not very apt to do so. In such case it is of the utmost importance to get the last speech to the jury, because the man who has the last speech can put the circumstances in the most favorable light for his own side and can attack the evidence of the other party. Ordinarily it would be advisable, then, to stand upon a replevin suit and not be non-suited.

Another thing which is advisable, at least in jurisdictions which have a short cause calendar,

is to retain the suit for the plaintiff so long as possible rather than to abandon the suit and become the defendant.

Many cases involving a considerable amount are capable of trial on short cause. For instance, if the right of action is on a note or on a lease, some document that proves itself, the plaintiff can put his case in in two or three minutes and try it within the hour to a certainty, while the defendant may find himself greatly distressed if he is in short cause.

The plaintiff, again, in some jurisdictions has the advantage of being able to experiment with his case. He can try it almost up to the finish and if he finds himself in much distress he can try it over again. In some jurisdictions this cannot be done; neither man is allowed to abandon his case, but in others the plaintiff can bring it on for trial; he can get all his testimony in; he can get all his opponent's witnesses in, cross-examine them, find out all that they know, and if he sees there is any danger of losing, take a non-suit and commence anew. This cannot be done, however, if the statute of limitations has run against the case; which must be guarded against.

There is a great difference between taking a non-suit and suffering a non-suit. If a lawyer is non-suited—that is, if the non-suit is forced upon him by the court, he can commence over

again in one year, provided that the statute of limitations has at that time already run. Some statutes are peculiarly worded, saying that if in any of the actions specified in the Act on Limitations the plaintiff be non-suited and if the time limited for the bringing of such action shall have expired during the pending of such suit, then a new suit may be brought within a year.

If the period of limitation has not yet run then that statute does not apply. Suppose a man has an action which is barred in five years and is trying the case at the end of four years, eleven months and twenty-five days, and is non-suited. He does not have a year extra to come in; he has only five days left because the statute does not apply. It applies only when the plaintiff is non-suited after the five years have expired. Action for death of a person is not always clearly defined under this one year privilege because such action is occasionally not referred to at all in an Act of Limitations; whereas the one year privilege seems limited to that Act.

Another case where the plaintiff can experiment may be given. Suppose the jury is waived and the plaintiff tries the case and finds that the judge is against him. The judge expresses himself fully and clearly and is about to enter a de-

cision against the plaintiff; the plaintiff then has the right to take a non-suit and it may be advisable for him to do so, unless he is barred by limitations, and he is ready to commence over again with possibly a better result than before.

The kind of action to be brought depends much upon the kind of case. Take for instance a case of domestic infelicity in which the woman is the plaintiff. If a divorce suit is decided upon it comes before the chancellor, and, under some systems, with a jury. As a rule the sympathies of the jury are with the woman and it is altogether likely that it is advisable to bring the suit in divorce rather than for separate maintenance. In a separate maintenance suit there is no provision for a jury. The chancellor may call one if he wants to but he does not have to do this and is not bound by the result if he does. But with divorce either side may call for a jury.

Common law marriages are among the cases which appeal peculiarly to the sympathies of a jury, especially where the parties have lived together for some considerable time and where children have been born as a result of the union. A small amount of evidence will satisfy the jury that a woman is the wife by common law marriage, whereas the chancellor is not so apt to be swayed by the emotions. He has been in court all his life and has become rather case

hardened. It would undoubtedly be a grave mistake, where the claim of the wife is provable by circumstantial evidence and where the base of it rests so much on sympathies, to bring separate maintenance rather than divorce, for the reason above stated, that one is tried without a jury and the other is tried with a jury.

The choice of the judge of the court is an important consideration in bringing litigation. In every large city there are numerous branches of the court and the careful practitioner must observe constantly and learn the personal peculiarities of the various judges. Some judges for instance are prejudiced against divorce, some approve of it. Some are more sympathetic and inclined to favor the woman, others are more severe and what is commonly called cold-blooded. Some judges, again, are known to be very indulgent in *habeas corpus* cases; whereas with other judges it is difficult to sustain the writ. All these are points which must be considered if a lawyer wants to do his duty by his client. A change of venue may be needed by the defendant—not only from one judge to another but sometimes from one county to another. It is well to inquire carefully into the temper of the people and of the judges before the assignment of the litigation is made.

On matters concerning real estate for in-

stance, a subject on which a great deal might be said, a few illustrations may be given. A right to a piece of real estate may be tested by bringing ejectment against the party. That would be an action at law with a jury. There are sometimes questions of titles and questions of inheritance which appeal to the jury. The proof of heirship, the proof that the client is an heir in some way, may involve a great many affairs in a family and in their ancestry, and sometimes the proof is very difficult for the claimant of property. So it may be entirely advisable to have it submitted to the jury for the reasons already given.

Again, to get a decision as to real estate in which the client claims a share of the property, partition may be brought, which is a chancery proceeding, with of course no jury. The client's claim is tested out by a bill in chancery which constitutes partition. Practically it is well to be prompt when bringing the partition, because under some statutes the lawyer who starts the suit gets a fee from the estate which gives his client that much profit, whereas if he merely represents his clients as defendants it is not certain whether any fee will come out of the property and he has to look to his client for his fee. The chances are that he would not pay so much as the lawyer would be entitled to get, and so

much as he would cheerfully pay if it came out of the property.

Again under some statutes property can be divided by petition for partition. There are provisions that if a client owns a share of real estate and wants the property sold and the money divided or the property itself divided, if it is capable of division, the client has a right to petition the court for a division. That is a law procedure not a chancery procedure, and all the issues in that procedure would be tried by jury. The steps are almost identical with those for partition; but the ordinary course of law cases is followed and it therefore would be a jury case.

So again the client may be a woman who has a claim to property for dower and she may bring litigation to set off her dower; or the client may have a claim to real estate and procedure might be brought under the Torrens Act for the registration of title; or in Chicago under the Burnt Record Act, a mode of proceedings in the courts since the Great Fire. If the client has a title to real estate he may proceed under the Burnt Record Act, and seek to preserve upon the records the evidence of that title. That proceeding does more: it finds whether the client owns the property itself and bars other claimants, if there are any.

Or again the client may bring proceeding in the way of quieting title, or proceeding may be brought in the Probate Court that the property may be sold. In the course of that proceeding it is laid down that the various persons who think they have claims against the property may be brought in and may be compelled to test out the matter there.

So there are six or seven different remedies and it must be decided by very close deliberation and a very careful analysis of the statute in each case provided, which one would be the best.

There is still one more way of testing the right to property. For instance, after the death of a man a woman who claims to be his widow appears and asks for what is called the widow's allowance or award, which means the support of the widow and children for one year. Some one else may come in and claim that this woman is not the widow but that another one is. Sometimes there are several widows. This means a contest which is heard in an informal way in the Probate Court and the result is sometimes obtained in a very summary manner. Lawyers may pay very little attention to whether the woman should have the year's allowance or not, but it may form *res adjudicata*—that is, it may be a decision which right or wrong may after-

wards obstruct the client in litigation involving the same subject matter.

The action of account is a law action, whereas an action to obtain an accounting is a chancery action. The choice may be found to be advantageous to one side or the other.

The validity of a mortgage may be tested either by foreclosure of the mortgage or by bringing ejectment based on the mortgage. It can readily be told whether or not the case is one appealing to the sympathies. Suppose that some poor woman has invested the hard earned savings of a lifetime in a mortgage and it is denied that the mortgage is valid and a litigation ensues. If she goes into chancery, with the many fine and sometimes technical doctrines of chancery (the saying about coming into chancery with clean hands is well known), such a claimant may have a good deal of trouble; but if she goes in her own simple way before a jury, the jury will probably find in her favor. She can test that mortgage by bringing ejectment and having obtained that decision it would be *res adjudicata* if later she brings a bill to foreclose the mortgage.

The advantage of being the beginner of the suit is very marked in many cases. Suppose a man owns a lot and hires a contractor to build a house. After it is finished there is much dif-

ference of opinion; the owner claims that he has paid the contractor more than was owing to him, and that the contractor spoiled part of the house; that various things caused damage and that the contractor is owing money to the owner of the lot. The contractor, on his part claims that he did everything well, that the owner did not pay all that was owing to him. If such a case comes into a lawyer's office, it would be his duty immediately to sue, because the man who brings the first suit controls the case. For instance the lawyer representing the owner sues the contractor, who commences a cross action, a set-off. The owner, controlling the litigation, would have the first and last speech and that would be the turning point in that case. Even if the opponent does not bring a set-off which he does not necessarily have to do because he may bring an original suit in the same or in another court, the first case is the senior case. The chances are then that the courts will consolidate the two cases and if they do this the second case will be brought into the first one and the same advantage will be held. Or if the two cases are not consolidated the first case should come on for trial before the second one if reasonable diligence is used in pushing it forward. The case brought first and tried first having the advantage of the first and last speech

will probably win, and the matter is then *res adjudicata* when the second case comes on. If due diligence is used it is altogether likely that the second case would be stopped until the first case is heard. There is always some advantage in being the senior; there may be a considerable advantage and at all events nothing can be lost by it.

A debtor arrested upon a writ of *capias ad satisfaciendum* may in some jurisdictions test the validity thereof by *habeas corpus;* in this he has the choice of judge and may apply before one who greatly, perhaps inordinately, favors the debtors on such questions. But the creditor has anticipated such a move and when asking for the writ of *capias* has caused the debtor to be notified thereof, thus giving him an opportunity to be heard against the issuance of the writ; herein the creditor has the choice of the judge and an order directing the *ca. sa.* to issue should to some extent be deemed controlling by way of *res adjudicata* in any subsequent *habeas corpus* proceeding.

There are many instances where the matter of the senior suit plays an important part. For instance a surgeon has performed an operation upon a patient and the surgeon has not been paid. The patient claims that the surgeon did not properly perform the operation; other sur-

geons and physicians tell the patient that the operation was malpractice. If the surgeon sues for his bill and recovers and is afterwards sued for malpractice; or if the two suits are running at the same time and the surgeon's suit is brought first and he wins, it has been held in many cases that that is an adjudication; it has been adjudicated that the surgeon did perform his work properly or else he would not have been entitled to his pay. It has been held that if he gets his judgment for pay, even by default, then that is *res adjudicata* that he performed his work properly. So cases are in the books where a patient claiming that the surgeon was guilty of malpractice actually had a suit pending for $10,000 or $15,000, while the surgeon has gone before a justice of the peace with his little bill of $50 or $60 or $100. The surgeon has established his claim for services before a justice of the peace, the time for appeal has gone by and that judgment has been pleaded in bar to the patient's claim for damages and the plea has been sustained. On the other hand if the patient had sued first and the surgeon afterwards the senior case would have the advantage over the junior case.

Often street railroad companies when one of their cars has collided with some passing carriage or wagon immediately sue the driver of the

wagon for damages. They bring a small suit before a Justice of the Peace, claiming that the driver of the wagon was in fault in running into the car and injuring it; perhaps he scratched the paint a little or broke a window. At all events they rush immediately with a small suit before a Justice of the Peace, and the driver of the wagon perhaps thinking little about it, and even his lawyer thinking it a matter of no importance may let the judgment go by default and the street car company obtains a small judgment. But the driver of the wagon who may have suffered severely, perhaps with broken ribs or with the loss of a limb in that same collision, when he later brings a suit for damages, finds that his suit is barred because it has been found in the judgment of the Justice suit that he was in fault and it was *res adjudicata,* which prevents his recovering against the railroad company.

The difference between a bar by *res adjudicata* under a prior suit and an estoppel in evidence should be explained. By *res adjudicata* is meant that the affair has been adjudicated. If the affair has once been adjudicated between the parties it then is obligatory upon each one of them not only as to all the matters involved in that case but in regard to all matters that could have been and should have been in-

volved in that case. There are two ways of taking advantage of *res adjudicata;* either by bar as a plea or by estoppel in evidence in the course of the trial. By bar as a plea is meant that if a matter has been sued and that same matter is sued over again, the decision in the prior suit is a bar. Or the prior suit may not be a bar, but in the course of the second trial may be used by way of estoppel. An illustration will explain. Suppose a man buys a horse warranted to him to be sound and as purchase price he gives one note for $100. He soon finds that the transaction was a fraud, that the horse is not sound, and that in fact it was a stolen horse; that the man who sold it to him had no title. Hence the note was without consideration or the consideration failed; at all events it is a complete bar to the note. The payee of the note sues on the note and the maker wins. Later the payee of the note sues again upon the same note; then the maker of the note should plead in bar that he was once sued upon this same note, that he pleaded and that it went to trial and that judgment was given. That is a bar. Suppose that this man in precisely the same circumstances gave two notes, each one for $50, the one note due in one month and the other note due in two months. When the first note comes due the payee sues upon it and the maker wins as

before, upon the ground that the consideration for the note had failed. Later the second one comes due, the payee sues on it. The maker cannot here plead in bar. He can not say that he has been sued on that note and that there has been an adjudication in his favor because he has not in fact been sued on that note at any time; but when he comes to his defense on that note he can plead an estoppel, and it is probably safest for him to plead specially, that that note was made by him under circumstances stated and in connection with another note, namely the note due in one month, and that he was sued on the first one and in that suit he set up this defense and that this defense brought a judgment in his favor and that it was necessarily adjudged that both these notes were without consideration. Hence the payee is estopped on the trial of the second case from contending that the second note is still a valid note, because the entire controversy was heard on the first one and applies to both notes and both litigations. So if the same plaintiff sues the same defendant and the defendant wins and there is a second suit the defendant pleads in bar. In the case instanced above, however, in which the railway company won and later the owner of the wagon sued the railway company, this reversed the parties. In the first suit the company was plaintiff; in the

second suit the company was defendant. There the plea would not be in bar, but it would be a special plea by way of estoppel.

Another consideration in determining the best place in which to bring a litigation is the conflicting decisions which at times prevail between the Federal Courts and the State Courts. The rules in the Federal Courts at times are quite different from those in the State Courts. A very apt illustration can be found in the 36th Supreme Court of Illinois, Manning v. McClure, which deals with the law of negotiable paper and which differs materially from the case of Swift v. Tyson, U. S. Supreme Court, 16 Peters 1.

There is a difference in the choice of the forum in that kind of a question and whether to bring litigation in the State Court or in the United States Court would depend upon the nature of the case. The Federal Courts are not bound by the decisions of the State Courts on matters of general law, on matters of common law, on matters of the law merchant or mercantile law—in fact are not bound by the decisions of the State Courts on any matters unless they be matters dealing peculiarly with the internal or domestic matters of the State itself, for instance, matters based on the constitution and statutes of the State and concerns peculiar to the State

itself. There the Federal Courts would follow, so to speak, the decisions of the State Court; but if a question be solvable by the application of general law, common law, the law merchant, the law relative to bills and notes and drafts, the Federal Courts follow their own theories, and are not bound by the State Courts. This may make a great deal of difference, which must be considered if there is a choice.

In the matter of damage cases, personal injury cases, there is a marked difference between the Federal Court and the State Court with reference to such a simple thing as chips flying off a hammer or chisel and injuring the laborer's eyes. There are quite a number of these cases and the Federal Courts at times hold them more favorably to the injured man than do some of the State Courts; though in a case against a large corporation which owns a large plant the impulse might probably be to go into the State Court.

Also on the subject of releases signed by people who have been injured, a number of decisions can be found in the Federal Courts somewhat different from those in the State Courts. It may be found advantageous to examine the two systems. Usually the first impulse of lawyers defending large corporations is to go from the State Court into the Federal Court. Some-

times it is advisable to do so, other times it is not advisable, and it is the duty of the lawyer, before he removes the case from the State Court to the Federal Court to consider carefully whether the principles that prevail in the Federal Court are more favorable to him than the principles that prevail in the State Court. If the party cannot well be sued in his resident state because the principles applicable to the litigation are not so favorable there and he cannot be caught in a neighboring state because he does not leave home, he may, however, have property in some other state which can be attached and thus subject him to litigation there.

The law relative to joining the employer and his negligent servant as co-defendants varies in different jurisdictions, some holding that they can be joined and others that inasmuch as the cause of complaint is essentially different, one being tried for his negligence and the other on the doctrine of *respondeat superior,* they cannot be joined.

The Federal Courts are also more liberal than the Illinois State Courts in allowing bills in chancery to cancel insurance policies, notes, etc., obtained by fraud. The State Courts refuse equitable relief on the ground that the remedy at law is adequate, but ordinarily the remedy is not adequate, for the policy holder or the holder

of the note may not bring his action for a number of years and in the meantime all the evidence may be lost. The State Courts however will enjoin the holder of a note not past due from transferring it, and this may prevent him from selling to a purchaser without notice.

On the question of *res ipsa loquitur,* on the measure of care which the licensor owes to a licensee, and in some matters of assumed risk quite a number of cases may be noted in which the Federal Courts hold more strongly for the plaintiff than do some of the State Courts.

Suppose a man has made himself obnoxious to his neighbors and a large band of them come and abuse him. Of course he wishes to sue for damages. Naturally if he should sue in his own county he would get no redress because the entire county is inhabited with the friends and relatives of the very men who committed the offense and sentiment is strong against him. It is useless for him to sue those people in his home County; but supposing he moved to a neighboring State and being a citizen of that State sued them in the United States Court in the Division which sits elsewhere. He comes before the United States Court, before a judge who is not elected by the voters of the County but who is appointed by the President of the United States, and the case is tried before jurors, none of

whom lives in the County or if one should happen to live there he may be challenged off. In this way he has a fair chance and is very apt to get a judgment.

This matter of establishing a change of residence depends upon several conditions, the most important of which is that the new residence must be assumed permanently. If a man actually assumes the new residence it does not make any difference whether he has been there ten minutes or a hundred years, he becomes a resident. Of course it is a little harder to prove residence if it is recent than if it has been for many years. The question of domicile or residence or citizenship is dependent not simply upon a lapse of time, though that is a circumstance to be considered, but also upon other elements. If a citizen of Ohio belonging to the U. S. Service is sent down to Arizona to do surveying he may be down there many years and still remain a citizen of Ohio.

A good illustration of a reason for choosing between the State and Federal Courts occurred during the Civil War and again in 1898 when the Federal statutes required that people buy stamps and affix them to notes, mortgages and such paper as a means of producing revenue to the government. These stamps were sold to the people and to force the people to make use of

them it was provided that an instrument without being stamped could not be given in evidence on any trial. That is, it could not be given as evidence in a suit in the Federal Court, but if the suit were in a State Court it could be offered without having the stamp upon it. The United States is one government but the State governments are entirely distinct and separate governments and it is a principle that no government can control the actions of another one. If the United States attempted to do that to a State Court it would not be legal and the State could not be bound by any such statute of the United States and has been held not to be bound. So a matter like that would be of the greatest importance in determining which court to go into, because in one court a cause of action could be established and in the other it could not.

Sometimes even when there is no controversy there is a preference in the choice of courts.

In the matter of adoption, for instance, there may be several courts in which to go under the statutes. The County Court however would not be as advisable as the Circuit Court in such a case for this reason: the Circuit Court is a court of general jurisdiction whereas the County Court is to some extent a court of special or limited or inferior jurisdiction. This decree of adoption might carry with it very serious conse-

quences. It may be assumed that the people who adopt the child cherish it as their own and that when these people die the child will inherit. Now a decree sent abroad if it be a decree of a court of general jurisdiction has more force and is more easily proven and is less subject to technical objection and comment and criticism than would be a decree of a court of limited jurisdiction. So even where there is no controversy there is still the choice to contemplate and decide upon before commencing proceedings.

Illustrations may be observed every day of the importance of this choosing of courts. A recent one in Chicago occurred in a Council meeting in which the Mayor had made some statement about the Traction question and the City's lawyer about midnight rushed out of the Council Chambers to a judge who was waiting and filed his bill in Chancery there in order to get the advantage of being the first complainant in the State Court, lest the Traction Company would become the first complainant in the Federal Court the next morning.

Sometimes it is advisable to sue before a Justice of the Peace. Sometimes it is advisable when taking papers on behalf of a client to take a series of small notes, none of them over $200, rather than large notes, in order that if quick action be needed a speedy trial can be had be-

fore a Justice of the Peace. There are many advantages in a hearing before a Justice of the Peace, especially in a large jurisdiction, one of which is that a lawyer who likes exercise in the country air may sue forty miles from the city and go out there to enjoy it, no matter how his opponent regards the matter.

In a court of record the terms must be watched. An instance in illustration of the importance of this occurred before the Bankruptcy Law went into effect, which might apply if the Bankruptcy Law should be repealed. A lawyer secured a client's claim and if he attached prior to the first day of the term he would find other creditors attaching also in the same term of court which would let them have a right to pro-rate. He, however chose the term of court and a court in which there were only a few days, perhaps a few hours left, so that by the time the other creditors discovered that he had attached they were too late to attach in that term of court and he had the benefit of collecting his client's claim in full, whereas the other creditors came in at a later term of court and were not allowed to pro-rate or share.

CHAPTER II.

PREPARING FOR TRIAL.

THE preparation of a case before going into court is a very important matter. The lawyer must acquaint himself thoroughly with the subject matter of the litigation. In a case of homicide, for instance, if it is at all practicable, at all possible, the scene of the killing should be examined; the location of the participants should be gotten as closely as possible by illustration, by explanation or by measurement. Attorneys often find it advisable to go ten or twenty miles into the country to look all over a farm-yard, a barn, and house and wood-shed, and everything involved in the scene of the homicide, getting the location clearly in their minds more plainly than any drawing or any witness could make it. Witnesses often make mistakes or if they do not make mistakes they may not have the ability to portray the matter by words and drawings as it actually existed. The entire surroundings should be carefully examined even if it be months and years after the homicide. The house is there, the trees are

there, the barn is there; the general location of things can be grasped. It will help greatly in trying the case, help greatly in cross-examining the opposing witnesses, not only to know what to ask of them, but what is of still more importance, to know what not to ask them. Facts after all are stubborn things and when undeniable actualities are opposed the less said about them the better, because the more they are referred to the more difficult it will be later to evade them. One thoroughly acquainted with the surroundings knows almost intuitively what to ask and what to refrain from asking.

Particularly interesting, both to the plaintiff and to the defendant, are injury cases in which persons are hurt in the complicated machinery of large factories. No amount of explanation from any one can give so much information about a machine as can be learned from close examination of the thing itself. A lawyer recently won a defense because, almost at the risk of his life, he had climbed to the top of a very dangerous piece of machinery in order to look at it while it was in motion from precisely the standpoint that was occupied by the man who was injured. He was enabled thus to tell exactly what had happened and why it happened and in the examination of his own witnesses to know exactly what to draw out in order

to present the matter to the jury as it actually had occurred.

The closest observation is at all times necessary. Every incident, every detail, no matter how insignificant, should attract the attorney's attention, even though it is apparently unmarked and its value must at times be quickly determined. In the trial of a recent case the question at issue was whether a testator was of competent mind to make a will, and the trial therefore was on the condition of his mental power at the time the will was made. The contestants who were opposing the will had been at a loss to obtain evidence of the old man's mental condition. The will was made in favor of his housekeeper who had cared for him for the last eight years of his life during which the old man had been stone blind. Nobody ever came to talk to him except in her presence and the communications were very brief indeed, unless, accidentally, it might happen that he got out of the house for a few minutes unobserved and one or other of the town people going by exchanged a few words with him. A jury was called and each one of the jury was asked if he had any opinion as to the case or any opinion as to the mental condition of the testator and finally one man said that he had a very decided one and the Court excused him.

Now it was plain that this man possessed information which would make him a good witness for one side or the other but if the contestant's lawyer had gone to him immediately and this man had said: "Yes, my opinion is, that the man was sane," the other jurors standing around would have been influenced by that. So the lawyer apparently disregarded his statement and waited until the jurors dispersed for the noon hour and until this particular man could be found alone. Then the lawyer who had been following him said, "Excuse me, you said you had an opinion about this case; may I ask what your opinion is?" "Why," the man said, "He was as crazy as a loon!" At two o'clock that man was back in court as a witness and won the case for the contestants.

There is nothing wrong about taking advantage of points like these, nothing dishonorable, nothing improper. It is simply applying the available material to the best advantage. There was a criminal case some years ago in which one of the very important points was whether a certain implement, a case-knife or jack-knife which was there as an exhibit, had upon it stains of human blood or other kind of blood. One of the lawyers made the grave mistake of taking a witness in the court room, talking to him and displaying the knife in the presence of the jury.

The witness who was an expert took a look at it and did not come back, which was equivalent to telling the jury that that witness's testimony was unfavorable or the lawyer would have had him back. The place to examine the witness is away from the jury box altogether; then if the witness is doubtful there is no law of morals or any other law to compel him to be called; he can simply be ignored. If he is a favorable witness, on the other hand, he can be produced at the proper time and place. These are points in the preparation of a case that require constant attention.

So also not only all the facts connected with a case but all the law connected with it as well must be learned. The theory of the law must be mastered; what elements are needed to prove the case or what elements are needed to establish the defense as the case may be. Not that facts shall be manufactured which are not there, but that according to the law of the case the best use may be made of the facts which are there. A simple illustration is a case which in its nature requires a demand upon the other party for payment or a demand for certain papers. If a demand is an ingredient of the case then it is necessary to see before the litigation commences that the same is made; or having commenced the case to see that the proof of the demand is offered so that all the details requisite by law may be properly es-

tablished if they exist. If they do not exist, if there is no case, it may as well be found out at once. So also it is well, by way of preparation, to learn as much as possible about the opponent's case or the opponent's defense so that preparation may be made in turn against it. The defendant may claim upon the trial for instance that the cause of action against him has been released. This may be learned from talk between the litigants which precedes the trial and in that case provision must be made against it. It must be ascertained why he claims a release, what the circumstances are under which he is likely to advance proof, and rebuttal must be ready against it at the proper time. It may be urged that these things can be learned in the course of trial and that if surprised by them a lawyer may obtain a continuance. That may be true but to get a continuance means perhaps three more years of delay which discourages the client and justly subjects his lawyer to his criticism. All that care and thought can do to overcome these contingencies in advance it is a lawyer's duty to do.

Chess is one of the greatest games of science and skill and there is one leading rule in chess. Before any move is made on the board it must be expected that the opponent will make a countermove which will be the strongest possible move

that can be made. So also it is with a litigation. It must always be expected that the opponent will do the strongest possible thing that he can do on his side. If then he does less so much the better; if he does make the strongest move it has been expected and prepared against.

Sometimes it is not possible to know in advance much about the case because the declaration may be too general. In that event a bill of particulars must be brought in order to get such specifications as will enable better preparations to be made. Much thought must be given to the declaration.

If the declaration is bad, it often will be a great blunder for the defendant's counsel to demur to the declaration because by so doing he merely assists the plaintiff's attorney to a better declaration and a better statement of the issue which he is presenting on the trial. If the declaration is bad the defense should be very glad of it; because first if he loses the case he will still have a chance to move in arrest of judgment, whereas, if he demurs he waives the right of ultimately moving in arrest of judgment. And, second, if the declaration is bad and he does not demur and ultimately loses he may get the case reversed because of the bad declaration. So he has done his technical duty to his client on behalf of the defense by giving him a new

trial and delaying litigation and warding off his opponent as long as possible; whereas if he demurs to a bad declaration and especially if he argues the demurrer, as many do, he is simply educating the plaintiff's attorney. He is showing him first how to draw a good declaration, one which will stand when won, and second he is educating him how to formulate and present properly the evidence in support of his case. In other words he is doing his opponent the greatest kindness while he is supposed to be drawing pay from his own client. It is a subject for continual amazement to see lawyers eminent in the practice taking such steps. There are, however, instances where the opponent may be by demurrer driven to untenable positions and thus to defeat.

A declaration should be demurred to however when the demurrer and amendment do not aid the plaintiff or his attorney in the least, but are needed for the defendant and his client to prepare themselves for their side of the engagement. An illustration is a declaration against the City of Chicago which says that the plaintiff was injured by a defective sidewalk "in the City of Chicago." In this instance the City Attorney must demur and demur specially, because the declaration fails to show where in the City it happened; and clearly the City Attorney in such a case cannot prepare for the defense. He

is told the plaintiff was injured in the City of Chicago on a sidewalk. The City of Chicago is thirty miles long and ten miles wide and has thousands of miles of sidewalk; and if the City Attorney is conducting a case like that he may think the plaintiff was injured on State street, whereas, when it comes to trial the plaintiff may insist he was injured on Halsted street, and the City Attorney be left without any evidence to meet that accusation. He may have thought the injury happened on State street and may have had witnesses as to that location and no witnesses as to Halsted street. Hence, very clearly it is the duty of the attorney for the defense to demur and demur specially, that the declaration is vague and indefinite and fails to apprise the defendant with reasonable certainty of the time and location of the injury. Upon which the demurrer will be sustained and the plaintiff will then amend and state that he was injured on the east side of State street, between Madison and Washington streets, which probably would suffice. The court would probably not compel him to say exactly where but within reasonable bounds so that the defendant could make preparations for the trial. That kind of a demurrer is right.

Of course a demurrer cannot insist that the plaintiff shall plead his evidence. The demurrer

can neither ask nor will the court grant that the plaintiff must give evidentiary facts. All he must do is to give the ultimate facts. But the ultimate facts must still be given with some reasonable definiteness, so as to give the defendant an opportunity to meet them. The question here enters whether to say that the man was injured on the east side of State street, between Madison and Washington, in front of a certain number, and that the plank of the sidewalk was broken and the nails in the plank were rusty and the stringer was rotten, or whether it is sufficient to say that the sidewalk there had become unsafe to walk upon and insecure, without saying why it was unsafe and insecure. But this is a subject that is covered thoroughly in books on pleadings and need not be gone into here.

It is advisable to demur at other times on similar principles. A large steel company for instance is being defended in a personal injury case. If the plaintiff should say he was injured in its plant it would probably be the duty of the defendant there to demur specially and to find out in general terms of the declaration in what particular part of the building, or at which machine it was that the injury occurred, because otherwise the defendant would not have a fair chance to inquire into the accident and prepare for the defense.

Again a demurrer may be necessary to obtain information, to find out what has to be met; or it may be necessary because the declaration contains things prejudicial but not proper to the case itself. In that case a lawyer must either demur or where a demurrer is not applicable he must get these things out by motion. For instance, a plaintiff states a cause of action in his declaration and inserts various other matters which are not proper as constituting or helping to constitute any cause of action. But they are alleged; they are in the declaration. Now, if the defendant demurs he will be overruled because the declaration is sufficient, and hence the demurrer cannot be sustained. If he then pleads and goes to trial there will be put in all the evidence on the real cause of action and also evidence under the declaration which does not belong to the cause of action, tending to injure his client in the estimation of the jury because jurors are not very discriminating. Under these circumstances the remedy would be, before pleading to the declaration, to obtain by motion an order to get out of the declaration the matter which is in there; impertinent, irrelevant, surplusage and scandalous, as it is termed in law. That is the proper way to pare down the declaration and to get it as it should be without improper and unfair prejudicial matter.

CHAPTER III.

COURT ROOM CONDUCT.

A SUBJECT on which a few remarks may be appropriate is that of the court room conduct of the attorneys in a litigation. A great many people appear still to have false ideas on this subject and to think that a lawyer should assume some sort of artificial demeanor while in litigation, whereas the strongest position for him to take is undoubtedly that which is most natural to him. It is just as inappropriate for a small man to go into a court room and assume a pompousness and dignity, a deep tone of voice which is unnatural to him, as it is for a large, dignified man to go before the Court and belittle himself by some buffoonery. The best conduct in general is the natural conduct, the unaffected every-day manner of the individual which becomes him best.

Of course there is much to be said in favor of training and culture. Some men have naturally a defective voice and much is to be accomplished by developing the voice and strengthening the tone to give it better carrying power. The value

of a powerful, pleasing voice can scarcely be overestimated but the pitch of the voice from beginning to end should be the customary speaking tone. Many speakers still make the great mistake of commencing their argument with vociferation, with thunderous tones of voice which become tiresome to their listeners and the effect is much like writing a letter and italicizing every sentence. With all italics there is no emphasis. The emphasis, the stress of voice, must be reserved for those places where the more profound impression is to be made. If everything is emphasized the important parts are lost among the unimportant. The quiet, self-possessed conduct of the attorney is by all odds the most effective manner for conducting a jury trial, especially if it be a long trial. It may be that if the matter is run through in half a day or even a day, vehemence, and an impassioned utterance may be effective. But in a long trial the voice must be reserved and the emphasis must be reserved. If there are some very cogent pieces of evidence they should not be exploited and exhibited at the very beginning because they will fall flat afterwards. The effect of the case should be allowed to grow upon the jury so that it falls constantly with a greater and greater impression upon their minds. Then at the end when force and emphasis are needed, the reserve power to

make the desired effect upon their minds will be available.

Much might be said about manœuvring in the conduct of the trial. There is a trick frequently employed that should be guarded against. In very serious cases of injury and suffering in which the plaintiff perhaps has become badly crippled, serious criminal cases and even in cases of death the lawyer defending sometimes seeks at every point to break the solemnity of the case, to throw an air of levity around it so that the jurors may not be oppressed with the entire weight and responsibility of so serious a matter. The defending attorney will introduce little side-remarks and stir up little bits of hilarity. The other side will frequently be caught by that trick and will unwisely be tempted to retort, which is just what is desired. By far the most effective safeguard against such attempts is a dignified, reserved demeanor which ignores such petty trickery and allows it to waste itself upon the armor of indifference.

Also there are attorneys who are much given to a constant play of the emotions, seeking at all times to rouse feelings of sympathy, of pathos, or perhaps of hilarity. That is usually poor policy because they are scattering their shot. They commence a long trial and in the very early stages explode some pyrotechnics of oratory

which should have been saved for the close when they are summing up. When the time comes in which such ammunition is most needed they will find that they have by those scattering small fusillades that have been going on for hours or days or weeks wasted the impressions that they might otherwise have made. It is much better to keep such things in reserve until the time when they are of the utmost importance—away at the end, in a consolidated, forcible, crystallized shape. One cannon-ball can demolish a wall, whereas a lot of scattered pigeon-shot has no effect except to make a little irritation.

In small communities where jurors are supposed to be known it is perfectly proper to address each one of them by name and they probably would expect to be thus addressed. Every man considers himself of some importance in this world and every man likes to think that he is recognized by other men and that his name is well and correctly known. The fundamental principle by which politicians get into office is to greet all men promptly by name. Even in the large cities attorneys occasionally step up in front of the twelve jurors and without looking at a note or memorandum manage personally to address each one of them correctly. If a lawyer begins this he must go through the entire twelve, because if he calls eleven by name and skips the

twelfth one the last man will be offended to think that he is not considered as important as the others.

While engaged in taking the jury this is occasionally done and it has presumably never been criticized as improper. There are courts however which have reversed a decision because the lawyer spoke to four or five of the jurors thus by name during the arguments, claiming that it was an improper appeal to those men, to pick them out and speak to them personally, as it were, although in the guise of an argument. So there is always room for consideration in such matters.

Above all things it is the part of wisdom and of honor for the lawyer in the trial to be fair and square, to be honest, to be candid. Every case does not have to be won. If the case is not just, it should not be won. It is a greater wrong to win an unjust case than to lose a just one. The first is wrong, the second is merely a mistake. It is the part of duty for a lawyer to develop honestly and efficiently all there is in the case or the strongest there is in the defense but that is all. So if it occurs on questions of law and questions of fact that an error has been made the best thing to do is to frankly admit it. The old saying is a very true saying, that "Honesty is the best policy," as a mere matter of policy. It may happen in the course of the case or of the

defense that certain contentions have been insisted upon and later some unassailable documents or book entries may be introduced which conclusively disprove them. As a mere matter of policy it is best to admit the mistake and if there is anything left of the case to go on with what is left. If a lawyer obstinately insists that he is right in the face of indisputable documents the jury or the Court will lose all respect for him and for the remaining portions of his case and will surely defeat him.

The reprimand of the Court is something to be avoided at all times in every stage of the case, even from the moment of going into the court room, when some lawyers have been known to forget to remove their hats and have incurred a reprimand from the Court or bailiff. Of course there are times when a stand must be taken and the Court may be impatient, which cannot be helped. It is never well to argue with the Court because the Court always has the advantage. It is not a fair fight and the lawyer and his client will be the sufferers. So anything which will call forth a reprimand should be avoided because it is bound to lower the lawyer in the estimation of the jury. Many a very good case has been lost because of the constant bickering of the lawyer with the Court until the jury gets the im-

pression that the lawyer has no case and finds against him on general principles.

The jury, as a rule, like fair play. Fairness is by all odds the strongest position to assume in the course of any litigation and of course that involves being gentlemanly and tolerant and patient. It is better to be too tolerant than not tolerant enough; to avoid being the offender. The case should be conducted properly, within the bounds of law and in a gentlemanly manner; then if the opponent is differently constituted, if he is unfair, provokes discussion, makes jeering remarks, the jury will soon become prejudiced against him and turn their sympathies the other way. The time comes when they will see that one man is being imposed upon, that the other man's insulting remarks are wrong and unfair, and when a favorable opportunity comes he can be crushed with one effective response. A double end is thus gained. The antagonist has been overcome and the sympathy of the jury has been retained, a much wiser and stronger course than to follow him in his petty bickerings as some lawyers do; to bicker back and return sneer for sneer while both contestants belittle themselves before the jury. A lawyer loses nothing by a quiet, controlled demeanor, not hypocritical of course and not too submissive, for the client's interests must be protected at the right time, but

it is better for him to be a little too patient rather than too contentious. As a rule the Court will of its own motion in due time reprimand the offender; the effect of this is more forcible than if the reproof comes from counsel.

CHAPTER IV.

REPORTING THE CASE.

BEFORE going on with the jury—before doing anything at all—provision should be made to have a good reporter in attendance, a stenographer to take the case. If it is a case of any importance which can at all afford it, for the lawyer's protection and for the sake of his client, a good stenographer should be at hand. It is the lawyer's duty to provide the stenographer because the client does not know the importance of having one and if unfavorable results follow as a result of the omission the attorney would be to blame. It is true, litigants are not compelled to have one but the practice at the present time is almost dependent upon having a stenographer. Lawyers may write up from their own minutes or possibly from memory a report of the case, especially if it be a very short one of little importance with only a few brief witnesses. One way of making a bill of exceptions is to write up the substance of the testimony instead of all the spoken words by question and answer, but there is danger that this may not be correct,

and the court will not sign it unless it is correct, and the judge is too busy to write it himself. The court nowadays expects that a stenographer be provided. In former times the court would take elaborate minutes of the case and the bill of exceptions could be written up from the court's minutes, but very few judges now take minutes of a whole case. They jot down a few important points just for their own information but not to make a record of the case.

In some jurisdictions the court has an official reporter who is always in attendance and there of course it is not necessary to provide another one, though it may be advisable because the official stenographer may possibly not be entirely experienced or may not work at satisfactory hours. Suppose in the trial of a case the official stenographer has taken the case until five o'clock in the evening and has gone home. When the lawyer goes to his office and wants to prepare himself for the next day's argument, for a cross-examination perhaps, and needs the stenographer to read or to give a transcript of the evidence taken during that day, or of portions of it, he cannot be found. He may have gone to his home in a distant suburb and cannot be reached.

Again the official stenographer may make mistakes and the private stenographer can act as a check thereon or as an assistant in finding mis-

takes and having them corrected. It is interesting to see what minute accuracy is necessary in all stages of a case. An illustration of this occurred in a recent case in which a witness said that he had stepped slightly forward; "stepping slightly forward," was the phrase he used. It was taken correctly at the trial by the stenographer, it was transcribed correctly, but when it got into the reviewing court, in print, in the abstract of the case it read that he went "stooping slightly forward." It was about to be submitted on that when counsel noticed the error and had it corrected. In the Supreme Court the judges stood four for the case and three for the defense, and the four were very weak for the plaintiff. If that correction had not been made there is not the slightest doubt that the court in reviewing that case would have unanimously held for the defense.

This is the reason that the apparently unimportant correction made such a vast difference. The plaintiff was engaged in a foundry and at night in the darkness had to go out from the foundry over a long pile of ashes or cinders, carrying some implement to the further edge. He was injured by reason of some obstruction that was there and was required to show that he himself was in the exercise of ordinary care, so he testified that he went out through the dark-

ness "stepping slightly forward," which describes the exercise of care; that is, he was putting one foot slowly ahead of the other, feeling his way with care. But as printed that he went out there *stooping* slightly forward—he might have been running and still stooping; in fact runners do go stooping. That was the only item of evidence bearing on that proposition and the burden being on him his case would have been necessarily lost in the reviewing court if the abstract had contained his expression in the form "stooping slightly forward."

At times similar misprints or errors are made by the stenographer, though in this particular case it was not made by the stenographer but by the printer or the persons who prepared the proof for the printer, in printing the abstract of the case for the upper court.

The stenographer should be instructed to take everything that occurs from the very first moment that something is said in the case. Let him put down everything that is said by the attorneys, by the court, by the jurors, by the witnesses, or anyone else. It is always easier to ignore a matter afterwards if not necessary for a record than it is to supply it if it has been omitted. Sometimes a very slight expression of an attorney is absolutely necessary in the final

result of the case, something that may be forgotten if not preserved by the stenographer.

In the opening of a recent case the attorney for the plaintiff stated his view, and the attorney for the defendant stated very briefly his view of the theory of the case. The trial lasted several days and the listeners had almost forgotten what the counsel had said at the beginning. There had been much discussion and shifting about and questions had been sprung by the court; ultimately the attorney for the plaintiff offered some instructions which the court gave. Then the attorney for the defendant asked for a new trial on account of error in those instructions, which probably existed, but the attorney for the plaintiff compared his instructions literally with the statement which the defendant's attorney had made in the opening of the case and it was held that the attorney for the defendant could not complain of the instruction as it was a literal copy of what he himself had advanced as the theory of the case, although during the trial both parties had shifted away from it a good deal. He had made the statement however and the attorney for the plaintiff had a right to rely on it. So frequently a mere incidental remark, made by one or the other of the attorneys which the reporter preserves may ultimately be found necessary to prove the case itself.

The attorney for the defendant, in the opening statement may say that the defendant was running its car down the hill and so on, when it collided with the plaintiff's wagon. The case may last quite a number of days and when it comes to a verdict the defense may then claim that there was no proof that it was their car, that there was no evidence showing that their company owned the railroad in question at all. The plaintiff will then turn to his stenographer and the stenographer will read that in the opening of the case the defendant's attorney said that the defendant's car ran down the hill and struck the plaintiff's wagon. That is as good as evidence on that point. It may be that the plaintiff had no evidence on that point at all and relied on this statement as covering the point. If the statement had not been made the plaintiff's attorney would have subpœnaed witnesses to prove it. Details may be forgotten and only the general impression remains that the point was made. The plaintiff's attorney himself may not remember exactly how the point was covered but remembers that in some way it was covered and the reporter's notes will come to his assistance and furnish him proof of it.

The stenographer selected should be not only of the greatest skill in order to secure accuracy, but also a person of good standing in his profes-

sion, that is, one whom the courts know to be a skillful, honorable person who would report the matter correctly and not allow himself to be bribed or hired to make an incorrect report. Reporters have the opportunity and power to make incorrect reports and to do a great deal of mischief. Sometimes a word or two omitted or inserted would make the case entirely different. It is of the most importance that figures and fractions be heard correctly and taken down correctly. Questions of temperature, at which iron may be worked, for instance, or the temperature at which articles were kept, may play an important part in the evidence and a witness's exact testimony can later be verified only by the stenographer. Of course the lawyers take notes but their notes are not very accurate and not entirely reliable and they sometimes become confused in their own notes.

Another advantage in having a reliable stenographer is that he can be counted upon to be permanent in his location. The shorthand notes that the stenographer has taken may be needed later, in the next term of court perhaps or the next year, or in ten or fifteen years. One case may come and go though all the courts until after six or seven years it may be decided and then another case may grow out of that one, and by the time the second case is reached for trial it

may become important to know what had been said at the beginning of the first case. There may have been two or three trials of a case. They drag through the courts at fearful length. The writer has a case which has been going fifteen years and is very apt to go fifteen years longer. The note books of the reporter are very important in those circumstances. Of course the transcript can be kept but the transcript is not evidence, if anyone stands on a technicality. The reporter and his minutes must be found. The reporter cannot profess to remember the evidence. All he can do is to identify the transcript, find the minutes back of that and then read from his minutes. Possibly he would be allowed to testify that his minutes had been made fully and correctly and that the transcript was made by him fully and correctly from his minutes, and under these circumstances it might be allowed.

The transcript is very often needed by the judges in settling the bill of exceptions; there may be a long delay after the trial before the bill is made. The transcript is very important in arguing a motion for a new trial. Of course those are shorter intervals, and almost any reporter would suffice there—that is he would not have to be permanent in the place, provided he was accurate and competent, and enjoyed the confidence of the court.

CHAPTER V.

CALLING THE JURY.

THE first proposition in the case itself is the calling of the jury. The jurors must be examined to see whether they are fit to serve in the case. There are technically two openings to the jury. First the case is opened before the jurors are examined; next the jurors are examined; then the jurors are accepted; and then the case is opened before the evidence is put in. The first opening before examining the jurors is merely a short preliminary statement to inform the jurors in a general way of the nature of the litigation. No details are supposed to be stated in that. It is not in place to do so and may call forth the reprimand of the court. In a case for instance, where the plaintiff has replevied a threshing machine from the defendant an adequate opening before the examination of the jurors may be like this:

"May it please the Court and Gentlemen of the Jury:

This is a case where John Doe, the plaintiff, has replevied a threshing machine from Richard

Roe, the defendant, and that is involved in this case. Now, Gentlemen of the Jury, I will speak to all twelve of you on this rather than to waste time by asking each one of you separately: 'Has any one of you ever observed a case of this kind?' "

Too much care cannot be used in the very first utterance to the jury to avoid saying anything that may prejudice them unfavorably, and to avoid implications that may be derogatory to some of them. When the jurors are to be drawn out on any proposition it must be done in a manner that will not offend them. If for instance the attorney is prosecuting a man for stealing a horse and he fears that perhaps one of those twelve jurors may have been a horse thief in his youth and may have some sympathy for the accused it would not be the part of diplomacy to say: "Gentlemen of the Jury: This is a prosecution against the defendant for stealing a horse. Has any one of you ever stolen a horse?" A less direct but more tactful way to elicit the required information would be: "Gentlemen of the Jury, the accused, here, is on trial charged with stealing a horse and it is the earnest desire of the prosecution, and no doubt also of the defense, to find jurors who have no opinion and no bias in a litigation of this kind; so let me ask you in general, has your attention ever been attracted

directly or indirectly to a litigation of this kind in such a way as to influence your judgment? Possibly you have been witnesses or served on a jury and tried causes of this nature or some such matter has otherwise come to your attention." That is enough. Assuming that they answer honestly they will all answer in the negative, that they have never had any circumstance to direct their attention to that kind of a trial. If any one of them had ever been mixed up in such an affair he would probably say that he had been through some such matter and had rather made up his mind, which would be hint enough possibly to excuse him or at least to question further.

Sometimes in cases where people have been injured the jurors are asked whether they have ever had any experience in a case of this kind. Presently some one will say, "Yes, I was plaintiff myself, some years ago, against a railroad. I was injured and sued the company." That should be hint enough for the defendant to excuse that man because he fears that the man is of the opinion that the company was wrong in his case and that he will naturally assume that the company is wrong in the case to be tried.

At the time of acquainting the jury with the general subject matter, as well as in the opening of the case itself after the jury is taken and be-

fore any evidence is submitted, the general plan must be laid of how it is proposed to treat the case in its entirety as it develops. The leading thought in this must be not to disappoint the jury.

Suppose that a client has had his hand injured in a machine so that the small finger and the finger next to it are entirely gone and the middle finger is lost at the middle joint. That is a very serious injury but there is a good deal left of the hand; the thumb and first finger of that hand are still serviceable. It will not do in opening such a case to say to the jury: "Gentlemen, this is a case where my client has been deprived of his hand," because afterwards, when it comes to the evidence and they expect to see the fearful mutilation or the loss of the whole hand and find that more than half of the hand is still there, their tendency is to say, "That is not so bad an inquiry as we were led to expect." Whereas if the statement is made: "This is a case where my client has suffered somewhat through an injury to his hand; you will find that he has lost a portion of his hand," and then a hand is shown with two fingers entirely gone and another finger gone at the middle, they will say: "That is a very bad hand." It is only an application of the universal rule that if too great expectation is aroused the result is a disappointment; where-

as if expectation is kept within reasonable bounds the result is a favorable surprise. The actuality should always be greater instead of less than the expectation.

When the case is opened fully the jury is told in detail the questions which they are expected to solve, as, for instance, that the plaintiff sues for the value of a certain machine, that it is expected the defendant will claim the machine was not up to warranty and that the trouble was that some of the gearing which had been represented to be of a certain quality, describing it, was of a very defective quality—and so on. After the jury has been accepted the evidence on both sides is submitted. Then the counsel for the plaintiff again speaks to the jury in the opening address or argument; after that the defendant argues, if such is the case, and then the plaintiff closes. The plaintiff's attorney addresses himself to the jury four times and he should be very careful that he does not tire them, as there is danger of doing where a man has to speak so frequently. It is advisable therefore if there are two lawyers on a side to divide up the work, if both are competent, so that the different personalities and style of address may furnish a little diversion to the jury.

The examination of the individual jurors is called the *voir dire;* in this examination the

jurors are required to answer in regard to their qualifications to serve on that trial. There may be, even prior to that in civil cases and quite often in criminal cases a challenge to the array or panel of the entire jury. It may be claimed by the one party or the other that the entire jury has been illegally chosen. In that case there is a step to be taken to wipe out that jury altogether and have a new jury chosen. But it will be assumed that the jury has been properly called.

In general terms the examination of the jury should be befitting the circumstances. In a very small case for instance, where the amount is trifling and the question very simple, it clearly would be poor taste and possibly unfavorable to the result of the case for either side to insist upon a very searching and thorough examination of the jury. If the plaintiff's lawyer did this the jury would be led to expect some momentous case, to which they were to pay very strict attention and for which the best possible material was wanted in the jury and they would be disappointed when the trivial little case developed. On the other hand if the defendant's lawyer insisted upon an over rigorous examination the jury would very probably get the impression that he was afraid of the plaintiff's case, that there was something weak about his side of it which

might lead to his defeat. So, as in everything else in the world, cases must be adapted to circumstances. If the jury is to take a comparatively small case the amount involved being small and the questions few the more quickly it is taken the better it probably will be. The jury likes to have confidence shown in them and one of the best ways to take the jury, if it is deemed perfectly safe, is simply to say, when it has been seen that the other side has asked practically all that is necessary, "Your Honor, this jury is entirely satisfactory to me." This produces a feeling that the lawyer has confidence in them and on their part a responsive feeling of respect and confidence. This general proposition of course must always be predicated upon safety. There might be something in that jury which it would not do to take and it may be necessary to find it out, which will be presently considered.

There may be two ways of taking a jury: One is to take them in blocks of four, the other is to take the whole twelve at once. As a general thing in civil cases the whole twelve are taken; that is, the plaintiff examines the entire twelve jurors and if satisfied with them tenders the twelve to the defense and then the defense examines them. There is a privilege or right for the plaintiff to examine four jurors and, being satisfied with them to tender those four to the

defendant. Then the defendant's attorney examines those four and being satisfied with them accepts them and they are sworn as jurors. Lawyers in defending criminal cases and lawyers for railroads, in defending their damage cases, or in any such cases for the defense may claim that it is a slight advantage to them for the jurors to be called in fours. The reason that they consider this method a slight advantage for the defendant is as follows: If the plaintiff has the whole twelve of the jury before him he can use his peremptories to better effect because he can tell better which of the men are least desirable by seeing them all together.

There is much juggling sometimes in the matter of peremptories, especially in the small counties where everybody knows every one else. Peremptories are sometimes used to get rid of jurors, not because they are undesirable, but to get them out in order that some others seen about the court room may be chosen, who may be friendly to one of the lawyers or litigants and yet not disqualified. The practice in some jurisdictions is that when the regular panel of the jury is exhausted the sheriff fills the jury from the by-standers or talesmen, as they are called, standing about in attendance, and if the lawyer sees some of his friends in the crowd he gets rid of as many of the jury as he can. Telepathy

apparently at times plays a part in the selection, for the sheriff, with singular perception, at times knows exactly which ones in the crowd the lawyer had in his mind. There is not so much danger of this practice in a large city where the jurors are almost all strangers and the jury is not filled from persons in attendance but from other jurors in attendance.

If four jurors are taken at a time, though some of them may not be quite desirable, the plaintiff is afraid to send them out for fear he will get something worse and his peremptories will be exhausted. So he will strain a point and keep those four on the jury rather than send any of them out at the risk of getting worse. So he gets the first four and the second four and the third four and the jury is completed with some undesirable men on it, because after he has once said he will take those four he has to keep them. The reason that this method is more disadvantageous to the plaintiff than to the defendant is that the defense gains by a single undesirable man on the jury because it may lead to a small verdict or a disagreement and the defense can tire out the plaintiff with a succession of mis-trials or hung juries. Twelve desirable men are required to make a large verdict for the plaintiff but one undesirable man may spoil it. He may hold out for a small verdict or no verdict which will result

in a disagreement or a hung jury, and the defendant always gains by that, for the plaintiff is eventually glad to settle. For the same reason attorneys for the defendant sometimes care very little about the entire twelve on the jury. If they can get two or three or four good strong men who appear favorable and who will stand by their opinions that is all they care for. That may do for the defendant but it will not do for the plaintiff because one undesirable man is as much harm to the plaintiff as eleven are to the defendant.

Some things depend upon the locality in which a lawyer practices. If he practices in a small community his general method must be somewhat different from that which he would use if he practiced in a county of two millions of people or more. In Chicago it is customary to throw off from the jury any one who has any acquaintance whatsoever with the opposition. If there is a man on the jury who says he knows either the opposing litigant or the opposing lawyer, as a rule he is challenged off. There is always a little apprehension that he might be influenced by his acquaintance no matter how strongly he says he will not be. In a small community that would not be possible because everyone knows everyone else and some chances must be taken. If John Doe—on the jury—a highly respected man in that community, says he knows the defendant

and the plaintiff challenges John Doe the other jurors will have an idea from the fact that he was rejected that he thought well of the defendant and they will therefore infer that the defendant is probably right if he has such estimable friends as Mr. Doe. Every challenge, for whatever cause, produces a slight reaction of this sort. Therefore it is not well to challenge too freely unless there is a sufficient reason.

In some respects however inquiry in small towns must be more searching than in large cities because so many matters may center right in the jury. For instance the plaintiff is a large grocery concern and is suing a retail grocer for a considerable bill of stuff that it has sold to the defendant. On the jury is a man who is cashier of the bank in that small town. It is altogether likely that that bank has been lending money to the defendant, because in a small town every business man is borrowing money somewhere or other.

When the cashier is asked by the plaintiff's attorney, "Have you any interest in this controversy?" he would conscientiously answer no, but probably in a very close case the cashier, even if the most honest of men, would decide for the defendant because his subconscious reflection would be like this: "If I decide for the plaintiff and it runs into execution to-morrow against this

defendant and they lock him up, where does our bank get its money?" and his judgment would involuntarily be influenced.

Another case in a small town may be used for illustration, in which an electric car company is being sued. The lawyer for the plaintiff may think he is doing his full duty when he asks a juror if he is a stockholder in the electric railway company. He replies that he is not, that he has no interest in it whatever. He is kept as a juror, the plaintiff is beaten; and it is afterwards learned that that juror persuaded all the others. It is subsequently disclosed that he owns a subdivision two or three miles out; that he had divided his property into small town lots which he wanted to sell and that naturally he is interested in the welfare of that electric company. If they are making money he can ask them to put on more cars, whereas if the company is crippled with judgments they may not be able to afford them. Unconsciously perhaps this reflection runs through that man's mind and though he answers the questions honestly, because according to the statute he is not interested in that company, indirectly he desires its welfare.

In every jurisdiction may be found either by statute or by the common law principles—nearly always by statute—certain grounds on which a juror may be challenged. If those grounds exist

the challenge is made and the court permits the juror to be put off the panel. Also either by statute or by the common law—in addition to the challenges for cause—are permitted a certain number of peremptory challenges, challenges which may be exercised without giving any reason.

Great care must be exercised that the challenge when made is sure to be a correct one because if one is made which is not right—if for instance a challenge is made for cause and that cause is not laid down, and the court denies the challenge, that juror will be offended. So also if an additional peremptory challenge is made to which a lawyer is not entitled the object of that challenge naturally will become unfavorably disposed. He may be a fair-minded man, desirous of doing his duty but he involuntarily has become a little hostile in his attitude. So it is a dangerous thing to challenge if there is the slightest doubt that the challenge will be allowed; it is better to take a chance in not challenging.

It may happen that a man is justly challenged for cause but that the court overrules the challenge and does not put him out and the ill-will of that juror is incurred. After that the lawyer may have three peremptory challenges and use only two of them. The case is lost and then appealed and it is argued in the upper court that

the court below refused to put that man out when he was challenged for cause and therefore the court erred. The upper court may hold, "Yes, the trial court erred, but the lawyer had one peremptory left and had an opportunity to correct that error and should have put that man out on that peremptory. Not having done that he has waived the error." It is the rule in law and in every phase of the law that individuals must protect themselves in every reasonable way before they claim the protection of the court or of any one else. "The gods help those that help themselves," is a principle that runs through all law as it runs through all human relations. If a man neglects to close up a window leading into the basement of his house and the water rushes into that window and destroys his furniture stored in there, and it is seen that for fifty cents he might have gotten a board and nailed up that window, the chances are that if he sues he will recover just fifty cents, what it would have cost him to have protected himself. So in this case if the man could not be gotten off by challenge for cause, because the court made a mistake, the available peremptory challenges should have been exhausted in order to preserve the point that it was error in the court not to let that man out. If, however, all the peremptories had been

used on some other jurors the error could be preserved on this party.

While examining the juror on a challenge for cause it is proper to examine him very thoroughly, even slightly beyond what would be simple cause; it has been held that there is a right to examine further than that, in order to learn the manner and nature of the juror so that it may be determined whether the peremptory shall be used on him at all or not. In this matter there is quite a difference—as in all the steps of the case there is quite a difference in the practice in the various jurisdictions.

In some States for instance it is held that if during the examination or indeed during the trial something comes to the attention of the juror which is injurious to one side and erroneous it is the lawyer's duty then and there to try to stop the trial by moving for a *venire de novo,* a new jury.

In other jurisdictions it is held that the injured side must object to such improper and prejudicial matter and the court will sustain the objection and also tell the jury to ignore it. Which however, is of dubious effect because sometimes the more they are told to ignore a thing the greater the impression it makes upon their minds.

CHAPTER VI.

CLASSIFICATION OF JURORS.

THE nature of the case must in a general way determine the class of jurors that will be most desirable. In general groups the criminal cases differ from the civil cases and the civil cases may be divided into those appealing greatly to the emotions and those appealing altogether to the intellect.

Where it is necessary to hold jurors against sentiment and in favor of strict technical rights, logical jurors, who will adhere to the rules laid down of logic and of law and ignore matters of emotion and of sentiment, and who have intellect enough to understand the propositions are desirable. Ordinarily, it may be said, stupid jurors are best for the plaintiff. The last speech is about all their limited intellect can retain when retiring to consider of their verdict.

A litigation between a large bank and a railroad company on the question of a note, for instance, is more a matter of mathematics than of anything else; a question whether one company should collect so many thousand dollars from

another company. A case against a bank however in which the plaintiff is a poor widow, has a strong appeal to the sympathies. If it appears that the plaintiff has entrusted her hard earned savings to the defendant who fails to refund and who has no defense to plead except the statute of limitations, it is plain that almost every juror, if he possibly can, will decide for the plaintiff, and overcome the technical and what many think highly unjust defense of limitations. In a case of that sort a very cold-blooded jury is required for the defense, rigidly conscientious men, great sticklers for the law, technically interpreted, men who are bound by their oath against all sentiment.

Between similar litigants the defense of the statute of frauds would probably be looked upon by most juries as a harsh and technical defense and one which they would use any means to overthrow, though if the litigants were reversed, and the plaintiff happened to be a "chattel mortgage shark," incorporated, suing a poor struggling man, a defendant who had possibly for several years been paying high interest and who had pleaded bankruptcy, they would probably sustain for him the statute of frauds or the statute of bankruptcy or the statute of limitations or any other available statute or principle that might be called to their attention.

Again if a lawyer recognizes that his case is weak but he has the last speech he would naturally try to get as jurors men who are more readily swayed by the emotions rather than those jurors who are intensely intellectual and logical and on whom oratorical eloquence would have no effect; while if he has a strong defense, but a technical one, he would try to get intellectual, unemotional men who would not be carried away by their sympathies. In damage cases against factories, railroads or other large companies where the natural sympathy is for the plaintiff, and the defense is a technical and artificial one, such as fellow-servant, contributory negligence or assumed risk, men of strong intellectual qualities are required who will solve the matter as they would an irksome mathematical problem, but solve it correctly.

Several other features should be considered in the choice of a jury, such as the occupations or professions that are involved in the particular hearing, in the evidence and in the argument. In a case against a physician for malpractice for instance, where the jurors naturally would be much influenced by sympathy for the plaintiff, the defendant would do well to get as many professional men on the jury as possible, architects, civil engineers, contractors who build houses, superintendents of factories, men whose occupa-

tions or professions are such that they themselves might make a mistake once in a while, just as it is alleged this physician made a mistake. Their general inclination would be to hold with the defendant, unconsciously perhaps, but they would be a bit slow to convict another man of negligence and make him pay large damages when in their own positions some slight inattention on their part might bring a similar litigation on them. On the other hand jurors who had no occupations of moment, who had never felt the weight of responsibility might not consider that something should be allowed by way of extenuation or excuse for the defendant and they would be very much for the plaintiff and against the defendant.

In the general divisions of jurors nationality is another important basis of classification. In this respect the parties litigant must be considered, the opposing lawyers and the witnesses that may appear on one side or the other—especially the strong or leading witnesses who cover the chief points in the case and upon whose veracity the trial hinges. There is no doubt that "blood is thicker than water." People are instinctively clannish, and those of the same nationality will side with each other rather than with an alien. In a recent trial of a man of one nationality accused of killing his wife who was of quite dif-

ferent nationality, the prosecuting lawyer constantly challenged off from the jury the men of the same nationality as the accused, whereas the defending lawyer challenged off men of the same nationality as the deceased wife, and it was proper practice. Any lawyer would feel that he was delinquent in his duty if he did not do that. The case might come out all right and the lawyers feel that the challenged juror might just as well have stayed on if he was an honest man —but if he were not put off and the case did not come out right, the lawyer and doubtless his client would feel that he had made a mistake and that the case was lost because the juror's nationality was on the opposite side. Of course in the light, small cases, which do not get very deeply into the minds of the jurors and are readily solved it is not so important, but in a serious case it is considered a very important factor.

The matter of religion has to be considered in a similar manner, if anything even more than the matter of nationality. There are few things which so strongly, though usually unconsciously prejudice people as the matter of religion. The minds of even the most honest men are biased by the fact that they belong to a certain creed or religion, and they would be slow to discredit a man of their own religion and to give belief to one opposing him who belonged to an opposite re-

ligion. It is a practically invariable psychological fact that if a witness and a juror in a case belong to the same religion while the opposing witness belongs to another the juror will be strongly predisposed to believe the witness from his own church. At all events strong affirmative weight of evidence will be required to cause him to reverse his beliefs. Not that the juror says, "I will believe him because he is in my church," but that he unconsciously assumes the credibility of his brother member. So the religious element is a very powerful element and one that must be considered.

The matter of what might be called artificial bonds is at times even stronger than natural bonds; the natural bonds people are born into and perhaps would like to break but the artificial bonds they enter voluntarily. So membership in the same societies, the Masonic Order, the Odd Fellows, or Knights of Pythias, for instance may be a very strong influence. If one of the jurors in a case is a Free Mason and the principal witness is also a Free Mason and he is contradicted by a witness who is not a member of the order, it is very probable that other things being equal the juror, though intending to be perfectly honest would be inclined to believe his fellow Mason. The G. A. R. is another influen-

tial organization between whose members strong bonds of fellowship exist.

Sometimes an appeal to a jury on the grounds of fellowship, if it can not be avoided in any other way may be anticipated and discounted. In a recent case against the City of Chicago in which the plaintiff was injured on a defective sidewalk and sued the city, three of the jury were saloon-keepers. They were undesirable jurors for the plaintiff. When a saloon-keeper is on the jury the attorney for the city may be expected to work in allusions to the effect that if the city is burdened with paying heavy damages to people injured on the sidewalks it will have to increase its taxes and possibly will have to increase its license fees. This catches the attention of saloon-keepers who are afraid that they may have to pay a higher fee and who also catch the implication that the city is watching them. They know that there is some connection between the city and the police and they fear that some day the police will come and close them up. It is no cause for challenge that a man is a saloon-keeper; a man who keeps a saloon has just as good right according to law to be a juror as anybody else has. If peremptory challenges had been used in this case it would have been necessary to challenge all three or none because if only two of them had been challenged and the

other challenge held in reserve the one man would have resented the slight to his colleagues. Knowing all this the plaintiff's attorney, instead of challenging any of them won the favor of the three saloon-keepers who happened to be Germans by telling the following story in his closing speech. He spoke something like this: "And now, Gentlemen of the Jury, the case is with you. I have tried to do my duty and I know you will take pleasure in doing yours. The City of Chicago is all-powerful; it holds in its hands the property of the richest and of the most humble; it is anxious as a city and all the people are anxious as a people to do right and justice to everybody. A story of the great Emperor Frederick comes to me. When he was building his palace near Berlin, this beautiful edifice costing millions was fairly completed excepting one wing. Some forty feet of one wing had not been built because on the ground where it was to be built there stood the cottage of a widow who refused to sell it. The Emperor's engineers offered her a fabulous price for the cottage but she refused saying it was hers; that there she had been born and there would she stay until death. The engineers asked the Emperor's permission to tear down the cottage. They said that they would do the right thing by her, give her a more beautiful place somewhere else. If he would but

say the word they would tear it down and complete the palace, but the Emperor replied, 'No, let the cottage stand as an evidence that of all my powers the prerogative to do justice even to the most humble of my subjects is predominant in me!' " This tribute to their spirit of justice reassured these jurors and the verdict was favorable.

In the general selection of the jury the material of the opponent's case must also be considered and in this regard anticipation must to some extent figure. In a case for instance involving a collision between a passenger engine and a farmer's wagon, the defendant may naturally be expected to call as witnesses the train-crew, the conductor and the fireman and possibly some of the trainmen. The plaintiff has an idea that the witnesses for the defense will be people of that kind, which may give him some intimation how to use his peremptories on the jury. If he found some railroad men on the panel, some of them possibly belonging to the railroad employee's union, it would be a wise thing to challenge them off because he may anticipate that the witnesses for the defense will be very much of the same general calling as these jurors.

In cases involving death there is a decided advantage because it can be ascertained from the coroner's inquest or from examination of his

record what kind of men or women will appear as witnesses. In this way an outline can be gotten of the testimony, at least that of the principal witnesses.

In criminal cases the defense learns this from the indictment, because as a rule in nearly all the jurisdictions the names of the witnesses are in some way appended to or endorsed on the indictment. In some States the accused have a right to be furnished not only with the names of the witnesses but with a transcript of the testimony that they gave before the Grand Jury. A lawyer must learn from his client, as thoroughly as possible, all that he knows about the witnesses who will appear for the other side. In that way a great deal of information may be gained on which to base challenges. If a case has been tried before, a very good idea of the witnesses and of their testimony may be obtained from the record of the former case and other important sources of information may suggest themselves in particular cases.

It will be found at times that jurors have convictions of right and wrong to which they adhere quite positively. If they are honest and conscientious they will state these convictions when they are examined and they may be ground to challenge for cause or at least peremptorily. It is seldom that a juror deliberately lies; if he has

a preconceived opinion he usually admits it. If a juror does tell a deliberate lie without being discovered and is taken on the jury, if he is found out before the trial is through, a new jury must be moved for immediately. It will not do to keep quiet and lose the case and then ask to have it all undone. The Court probably would not call an entirely new jury but would put a new juror in his place and then commence the hearing all over again. If a juror's deception is discovered after the verdict but still within the term of the court attempt must be made to get redress by motion for a new trial, and the deception must be set up supported by affidavit. But if the term of court has closed and judgment has been entered on the verdict the only redress would be by bill in equity or by statutory proceedings where such provision is made.

In the matter of preconceived opinions many men for instance will not recognize the defense of fellow-servant if they can help it because they consider it a technical defense and not meritorious. In a railroad case in which a man working in a railroad yard fixing the track is run down by a railroad hand-car pushed by his fellow employees the ordinary layman may not be willing to follow the defense of fellow-servant because he does not think it right. He holds that the man was entirely blameless, that he was working

for the company and was run down by the servants of that railroad company and he is more inclined to the doctrine of *respondeat superior*—the doctrine that a superior is responsible for what his subordinate does. The ordinary layman will very frequently throw out the defense of fellow-servant and allow the injured man to recover. That there is justification for this view, especially in railroad matters, is seen in various States which have deemed this defense oppressive and enacted statutes that a railroad man who has been injured may recover from a company although the injury was inflicted by a fellow-servant. In defending a case like that the jurors must be gone over carefully to see whether they will take the law from the court, whether they really understand that although they have their own opinions as men yet the law is a complicated science and they must listen to the court and obey the law as given them by the court. Sometimes a juror on close examination will adhere to his own view of right and wrong and very reluctantly, if at all, admit that he will be guided or controlled by the instructions of the court. Such a juror must be rejected though the court may not admit the challenge for cause because the juror may finally grudgingly say that he will take the law from the court, but the examining lawyer should know

that "a man convinced against his will is of the same opinion still."

Jurors must not be allowed to imagine that they are suspected of dishonesty or ignorance or anything of the sort lest they become offended, but they must be diplomatically examined in regard to these various possible opinions.

In many jurors will be found a profound prejudice against corporations as such. They are something outside the juror's mental grasp and consequently objects of deep distrust. Such jurors have a vague idea, derived largely from the newspaper cartoonist's conceptions that all corporations are grasping and oppressive and hence they are antagonistic to them on general principles. When a corporation is being defended the jurors must be carefully examined with regard to this prejudice and must be challeged off for cause wherever possible rather than by peremptories. The peremptories must be saved so long as it is safe because if they are exhausted unnecessarily they will not be available when needed.

There are a number of other important economic questions that figure greatly in court, for instance the labor question, involving union and non-union men: jurors will be encountered who have fixed ideas on the subject which nothing can alter. Political questions of course in-

fluence a jury, especially if the litigation has a political aspect, for instance if a newspaper is sued for libel. In these cases the jurors are inclined to find for the paper if they get a chance because jurors are generally a little afraid of the influence of the newspapers.

In criminal law one of the most important considerations in serious cases is whether the juror has any conscientious or religious scruples against inflicting the death penalty. If the prosecuting attorney wants to press a capital case and expects to obtain a sentence of death, it is very important for him to probe on that question because a certain percentage of men have convictions against capital punishment and if they are on a jury they will not vote for a conviction of murder in the first degree if it is a capital crime in that jurisdiction. They would convict of the next inferior crime but they never would vote for hanging a man because they believe that it is not the province of humanity to take human life. Of course such men could be challenged off the jury for cause. If the prosecutor does his duty he will probe the jurors to learn their views on that question.

The jurors must be examined in regard to their various moral beliefs. There is an anarchistic creed for instance whose believers do not deem themselves bound by their oath as a juror

or bound by the instructions of the court. In a case involving strong sympathy such a man would be a very good juror for the side on which the sympathies lie but he would be a very poor juror for the side whose right is based on the technical law of statutes and precedents, because he would ignore all of that very readily.

There are various statutes relating to the qualifications of the jurors that should be well learned because they may be useful when it is desirable to get rid of a juror if there is no other cause and it is not advisable to exhaust the peremptory challenges. Age is one of the statutory grounds of challenge that may happen to be applicable. After a certain age men cannot serve as jurors. In some States a juror may be challenged if he is not a freeholder. In some States they must be householders and have a family. They must not be aliens, and must be able to read and write. In some jurisdictions they must not have served on the jury within one year or within two years; this is in order to prevent having professional jurors who hang around the court house in hopes of getting on the jury. Other statutes in other places provide that they must be voters, that they must be tax payers, that they must understand the language, that they must not be parties to another suit in the same term of court. The latter is an important

provision which should be ascertained as a matter of peremptory challenge if necessary, because they might wish to establish in their own suit the very thing that they would try to bring about if they sat as jurors.

In some places jurors must not be members of a corporation. It does not happen so often in large cities but in smaller jurisdictions some person may be encountered who is indirectly interested against a litigant as a member of an association. It constantly recurs for instance in some States where they have a prohibitory liquor law or local option law that people form associations to suppress the sale of intoxicating liquors and when litigation results some of these very people are chosen on the jury. If that is not ground for challenge for cause it would be wise to make a peremptory challenge.

In some frontier States there are still associations formed among farmers to prevent horse stealing and a horse thief on trial before a jury of members of that association would fare ill.

If a juror in a case against a city happened to be a very heavy tax payer it might be a reason for challenging peremptorily because though one verdict would not affect him very much he might think that indirectly and ultimately it would affect him by being a precedent for other cases.

So various circumstances then with reference

to the jurors must be borne in mind because they may affect the litigants or their attorneys; the relations of landlord and tenant, of principal and agent, employer and employee, or partners must be considered; the interests of stockholders, of men engaged in lines of business similar to those involved, of keepers of public resorts, might influence their decisions. In a suit against a city a city official would make a poor juror because directly or indirectly he might feel it to his advantage to hold out for the city.

Opinions on the questions of sanity and insanity are important ones on which to probe the jury where the case may involve the defense of insanity or a kindred morbid mental state, hysteria or nervous depression.

Some jurors will state in advance that they would not convict a man on circumstantial evidence though criminal cases as a rule depend almost entirely or to a very great extent on this kind of evidence. It happens at times that a principal will turn State's evidence but the accused does not as a general thing surround himself with witnesses in order that they may see him kill somebody and circumstance is the only kind of evidence obtainable.

The following account of the notorious Luetgert case in 1897, in which Luetgert was accused of murdering his wife and boiling up the

remains to dispose of them is taken from a newspaper clipping of that date.

"With two exceptions all the challenges for cause yesterday were on account of previously formed opinions which the venire men felt they could not put out of their minds. One venire man was prejudiced against the police whose testimony he believed was like butter, and another, a fashionably dressed real estate man whom both sides tried hard to keep, said he had strong prejudice against circumstantial evidence." The prosecution in that case was entirely dependent upon circumstantial evidence so if this man had a strong prejudice against circumstantial evidence, he necessarily would stand out for an acquittal.

Many jurors have not much confidence in the police and the prosecution must challenge such jurors off because the prosecution is so often dependent upon the evidence of the police. It is stated on good authority that some city attorneys have a rule never to call a policeman as a witness. They feel that some of the jurors would not believe policemen, thinking they may have been sent there to tell a story on behalf of the city; and if jurors are dissatisfied with one witness they are apt to be dissatisfied with the whole prosecution or defense. If the jury gets an idea that there is a hired witness on one side they get

the impression that the whole side is crooked.

In the same Luetgert case a man was challenged because he would not believe a policeman on oath. Another man was challenged because he was supposed to be a member of the A. P. A., which if it ever really existed was supposed to be an organization of people who feared the Catholic influence in this country—the American Protective Association—to protect the American people against the encroachments of the Catholics. If this man admitted that he was a member of the A. P. A. and was on the jury, he would of course have a very strong prejudice against every witness who happened to be a Catholic, and his tendency would be to refuse to believe any Catholic witness. Another juror was thrown out because he said he was a friend of Inspector Schaack. Inspector Schaack was the police officer who aided the prosecution in preparing the case. On the other hand three were rejected because they were Catholics. To quote further from the newspaper clipping, "One was a bookkeeper who convinced Judge Gary and the State after hours of argument that he would make a fair minded juror and was peremptorily challenged by the defense." In his examination it was probably revealed that he had an opinion on the case of which the defense was afraid because in a shocking offense of that

kind the natural inference is that the opinion is against the defendant. He could not have a prejudice in favor of the defendant because he knew nothing of him, and hence if he had an opinion it would be against the defendant. After hours of argument he persuaded Judge Gary that he would yield to the court's instructions but no doubt he came to that so reluctantly that the defense challenged him, being still afraid of him.

After there is an acceptable jury in the box it is well to take some reasonable precaution—assuming the case to be of great importance—to see that the jury is not tampered with. It is a matter for regret that there is much endeavor in some communities to bribe jurors and it behooves the careful practitioner to be on his guard. It will be found for instance in very important cases that the State's Attorney has caused the jurors to be watched most assiduously from the moment they are examined in the court room until the verdict comes in. The jurors may not know that they are being watched; possibly not even the State's Attorney's own assistants are in his confidence in the matter; but the State's Attorney and his detectives know, and at times it is a very wise precaution.

Anything that may tend to influence the jury must be under observation, for instance news-

paper accounts where the newspapers are read by the jurors. Care must be taken to see that no improper influence comes to them in that way. The courts have at times set aside verdicts where it was shown that the jurors, while in attendance on the trial read sensational accounts of the case in newspapers. The jury should not be influenced by anything of that kind and it is altogether likely that in every jurisdiction where a jury was found to be influenced by sensational, inflammatory narratives in the newspapers it would be the lawyer's duty to call the matter to the attention of the court immediately upon discovering it. If the matter was so serious as to deserve the discharge of the jury, the court, no doubt, might discharge the jury and call a new one and take pains not to have a recurrence of the offense, or the court might satisfy itself with ordering the jurors not to be influenced by what they had read, although the efficacy of that is questionable. It is very hard for a juror, although ordered so to do, to cast out of his mind any impression which has once lodged there.

CHAPTER VII.

PREPARATION OF THE WITNESSES.

THERE is some work to do in the office before the case is called. The witnesses must be prepared for the court room work. In the first place attention must be given to see that the right witnesses are at hand and not the wrong ones; witnesses who throw some light on the case instead of those who do not. Sometimes there is a superabundance of witnesses and in the interest of economy a few must be selected and the others omitted. Sometimes witnesses leave the city before the trial or are hard to reach, so the choice must be carefully made. Frequently upon examination witnesses fail to cover the point that they have been relied upon to cover.

A client for instance, accused of assault, insists to his lawyer that it was a case of self-defense, that the other man beat him first and the question is practically who struck the first blow. The client comes into the office with a lot of neighbors and friends and kinsmen who were present at the altercation and who all say that he was not to blame, that the other party struck

first and with one accord they declare that they saw the altercation. Five or six are picked out and the others are allowed to go. When it comes to the trial these witnesses do state that the other party struck first but on close inquiry it is found that what they mean by this is that so far as they observed the other party struck first. This is meaningless because they did not observe what happened from the very beginning. This is one of the most common occurrences to be found in all kinds of cases. Witnesses on cross-examination are frequently made utterly useless. The witness asked "What first attracted your attention to this?" answers "I heard shouting and turned and looked," or "I heard angry words just as I came to the street, as I turned the corner," thereby admitting that he had not seen the beginning of the affair. Before the shouting something must have happened or else there would have been no shouting. Before the blow that he saw there probably was another blow which he did not see and on cross-examination he is forced to admit that he did not see the very beginning and hence his testimony is utterly useless. His adversary will say that that was not the first blow but that the client had prior thereto struck the adversary and that he has witnesses who saw the affair from the very beginning.

The lawyer may have had witnesses, who if

carefully examined would have disclosed that they saw the very beginning, yet by his inadvertence or his negligence he failed to bring those witnesses to court and the witnesses who did come were not able to support their side of the controversy.

So all the theory of the testimony should be gone over in advance to see that every proposition involved in the case is covered by the witnesses whom he has, assuming of course that he has witnesses on the proposition. Of course there will be propositions on which the client is in the wrong altogether and then the honorable thing to do is to try to get the matter adjusted or to get it settled, or in a criminal case to try to get the client off easily. But where he has the material for success his clear duty is to pick out the right material and not to ignore it.

In preparing a case a client will frequently say upon a certain point, "Oh, we do not need any witness on that. They won't contradict that," but that is a very dangerous suggestion to follow. They may not be called upon to deny it. It may first have to be established. The other side should never be depended upon to prove a statement because, when called upon as a witness, in the first place they testify grudgingly and with many explanations which probably weaken and ruin the proposition; and secondly, since their

opponent has made them his witness, to that extent their character is not allowed to be impeached. If one side calls the other side as witness they cannot afterwards impeach him. In some jurisdictions it may be shown by other witnesses that he has made a misstatement of some fact or facts, but in no jurisdiction is it allowed to impeach his character as such. The result is that when forced on the stand as a witness for his adversary he is given an air of credibility, and when later he appears as his own witness on his side of the case, the rest of his testimony comes to the jury under the sanction of his credibility and he is not allowed to be impeached as a man not to be believed under oath. So practitioners should not put themselves in that position unless it is absolutely unavoidable. There are cases possibly where it is necessary to call the other side as a witness by force of law, and under those circumstances he is not said to be a witness for the side that calls him, but he is recognized as a hostile witness and it is barely possible that when he then takes the stand for his own side he may still be treated as a hostile witness and impeached upon general lines.

In the course of preparation it should be borne in mind that the witnesses may never have been in a court and they should be cautioned to tell the plain simple facts of the case, to tell

them quietly and calmly, and so far as they can, disinterestedly. They should be dispassionate because they are to tell the truth for the one side as well as for the other. They are not called upon to take sides and if they allow themselves to take sides they impair the force of their testimony by their demeanor. A great many witnesses think it is a part of their duty to come into the court room and be as disagreeable as they can, even spiteful toward the other side, toward the litigant and the witnesses and everybody else on the other side. Such a witness would better be kept out of the court room, for no matter how truthful he may be the effect is altogether bad for his side of the case.

Witnesses must also be prepared to give the ultimate facts in the case and not their conclusions from the facts because the court will rule out a conclusion, will not allow the question to be put which calls for a conclusion and will not allow a conclusion to stand which is given by way of answer. The witness not accustomed to these technicalities is at a loss to know how to proceed and very frequently is unable to proceed at all. He blunders a little and then is ordered to step down from the stand, when perhaps his testimony was very vital in establishing that side of the controversy. Parties in cases have sometimes been forced to a non-suit, although they

had the material at hand to win their side of the case honestly and fairly, through the inability of their witnesses to give a technical or legal expression to their views.

What is conclusion and what is a statement of fact is not always easy to determine. A very skilled intellect is sometimes required to determine that and consequently it is the more important to go over the ground in advance with witnesses. In the very common questions of sanity or insanity, health or sickness, drunkenness or sobriety, of speed of trains or slowness of trains, the matter varies in various jurisdictions. In some, questions are allowed as to the conditions of the party or of the matter observed; a witness may be asked to state the manner in which the train was going and the witness may answer that it was going fast or slow. In other jurisdictions that is held to be a conclusion and erroneous, because they hold that the witness should give only what the witness observed and the jury will tell whether that was fast or slow. In some jurisdictions also the witness may be asked what was the condition of the party before the accident and after the accident but even then it is a little difficult to put the matter. The witnesses must be made to understand that they are not allowed simply to answer that the party was well before the accident and sick

after the accident, because that is a conclusion—or to state that he looked well before the accident and sick after the accident—that is a conclusion. The witness will have to state the details of his observation, as for instance, "Yes, I saw this party the day before she was hurt. I recall the fact that she was brought home in the ambulance. Prior to that time I had seen her very often and she was a healthy looking woman." Somebody may then object that "healthy" is a conclusion, and in some States it is held to be a conclusion, so the witness will be asked for more details. "Well, she walked erect and straight and sprightly and her eyes were bright and her complexion was clear, even blooming and reddish, and her general manner was of activity, and her weight was substantial," and so on. All those details are gone into in some jurisdictions. "What did you observe next?" "After this occurrence when she was brought home in the ambulance I did not see her for a while." The other witnesses have said that during that period she was in bed. "Well, what then?" "Well, about a month or two after that I saw her for the first time." "What did you observe?" "She looked shrunken, her complexion was pallid and her eyes were dim and she walked in a tottering manner," and so on.

Those are facts as distinguished from conclu-

sions. In some jurisdictions such detail of fact is held to. Of course every thing in this world is to some extent a conclusion since a conclusion is a deduction made from a group of facts back of it. But after all some groups can themselves be solved by a single statement. To take a very elementary illustration, a witness would be allowed to say that he saw his friend walk across the room, though technically that is a conclusion. He might go into detail and say, "I looked at him and he stood at the north end of the room; I then saw his right foot rise in the air and move forward about 18 or 20 inches and then strike on the floor, and then his left foot lift and move forward of the right foot about 18 inches and then it went down on the floor." These are the facts and in that way the progression is described from one end of the room to the other, but practically they are all included in the statement that the man walked across the room. To this extent statements of facts are not considered conclusions, though they might be conclusions because the man might not have walked across the room at all. There might have been a rope extended across the room and a derrick pulling him across the room. But where a group of facts has thus been stated in the plain accepted way the error in the conclusion, if there was one, may be shown by cross-examination. If the man

possibly did not walk across the floor the other party may ask, "Did you not see that there was a rope about his shoulders and that the rope extended up in the air?" "Yes, I observed that." "Then didn't you see that there was a man at the other end pulling on it?" "Yes, I saw that." So he is broken down on cross-examination.

The Supreme Court of Illinois has held that a witness may testify that a train was moving very fast, but a trial court has refused to allow a witness to say that because he believed it to be a conclusion. So if a witness has told his lawyer in his office that the train was moving fast, which is an important point in the case, he should not be allowed to go at that, because, having no experience in the court room and excited from the novelty of the situation he may break down on cross-examination and his evidence may be stricken out. If a witness says that the train was going fast it is well to find out how he knows that. Then on study and reflection in the lawyer's office the scene will come back to him because he has time to think and is not confused; whereas in the witness chair with the novel surroundings and the people looking at him he may be at a loss. The judge may be peremptory and while he hesitates, confused, call another witness. But the witness really remembers that the train was going fast because he was

walking along the sidewalk, observing the matter. He himself was in a hurry and he observed that the train had gone three blocks while he walked half a block. Those things attracted his attention and with time for consideration in the lawyer's office he will recall the circumstances. Or there may have been another basis of comparison. He may be accustomed to riding a bicycle and it may have left an impression at that instant that the train moved past him faster than anything he had ever observed before, either vehicles or animals.

Few things, again, are so hard to recall definitely from memory as matters of time, so where the question of time is an important factor search must be made in the preparation of a case for corroboration or correction of a witness. The human memory is utterly incapable of accurately grasping in the abstract matters of time. Things that happened thirty years ago may appear quite as vivid as those that happened two years ago. No witness can tell offhand from memory even the approximate time at which an occurrence took place. The human memory in the matter of dates seems to look down a vista, as the eye looks down a lane between rows of trees. The first ten, twenty or thirty trees are quite distinct, but beyond that they all appear to grow together and become

indistinguishable. So where the fixing of a date is an important point tangible corroborative evidence should be found to aid the memory.

In any ultimate statement of a particular fact the lawyer should see that his party is prepared properly to stand cross-examination. And he must find out whether he has the witness who can best cover the proposition or whether he must hunt about and find other witnesses.

The lawyer must also ascertain whether the witnesses are telling the truth, because many witnesses first through inadvertence and secondly through partisanship for their friend will tell things which are not true. In the first place they are not telling things under the sanctity of an oath and they fail to consider that in the court they will be. Then again they may believe the things they say. Their partisanship, their bias, has influenced their intellect or observation so that they honestly believe their own story, but a lawyer can see that it is not true, that it is exaggerated—possibly purposely, perhaps unconsciously, and he must quiet them down and get at the bottom facts.

Many witnesses turn themselves into a sort of advocate, believing that they are to champion the side that they are on, either in the lawyer's office or in the court room. They think that they must study ways to give the answers which

are the most favorable in their view to the side to which they are friendly. That idea must be removed. They must be made to understand that all that is wanted is the bottom facts, that it is for the lawyer to determine what use to make of them. It is his duty to prepare the case on his side as he understands it and present it in court. The witness must not be allowed to impose on his lawyer, to tell an exaggerated or perverted story which is relied upon and which later collapses in court and undermines that side of the case. His story should be exploded in the lawyer's own office if it is going to be exploded anywhere.

It is perhaps most difficult to elicit a perfectly honest statement from a witness on questions of opinion, because the evidence differs only so far as the parties themselves feel an interest in the case. If a client has an interest to prove that a certain property is very valuable the client's witnesses, being friendly to him, will put an immense value on the property—not dishonestly but thinking to do him a kindness and because they wish it to be that way. The wish is father to the thought. On the other hand, if the wish is to have the property of little value they will state that the property is worthless. A little illustration of that recently cost a party nearly a hundred dollars. The question was

upon the conversion of some chattels; the conversion was practically proved and the question was how much the property was worth, one party contending that the property was worth $200 and the other party contending that the property was worth $100. The party that was contending for the low value so exaggerated as to testify that the property had no value at all, was absolutely worthless. Later it was established beyond question that it had a value of at least $120. The result was that the jury ignored all that line of testimony and gave the highest value. The party could have gotten off by paying $120 if he had told the plain truth; but the jury was dissatisfied with his testimony altogether, threw it all out, and took the valuation of the other side.

So in preparing the witness and clearing his narrative the correctness of that narrative must be tested in the lawyer's office. The witness may insist that a certain demand for the payment of a note was made on a certain day and it may be important to know just the date. It may occur to the lawyer that the witness' statement will not stand the test in court; that purposely or erroneously he is giving a wrong date. He has heard from some other witnesses, or from what he knows of the opposing side, that that cannot be the date. So he must have the

witness search his memory, search for the corroborative facts; produce the correspondence or the book entries until he finds the right date and finds it fundamentally established, as he sometimes may, by indisputable evidence of book entries, letters written or received, or other documents, perhaps records in the recorder's office—mortgages made or released. The matter must be set together absolutely right so that it cannot be defeated by any counter evidence or any contradiction. A searching inquiry may show failure to make timely or any demand; in which event an altogether different topic presents itself, and if it can be established the suit must proceed on allegation and proof of waiver.

At times in this probing and searching process if a lawyer is still dissatisfied, thinks that the witness has not got the facts exactly right and that he will not stand a cross-examination successfully he must inquire if there are not other witnesses and keep inquiring until everybody that could possibly know anything about it is presented to him and a thorough examination made. He may find that his client has brought the feeblest and least important witnesses and has omitted to point out to him the strongest, clearest and most important witnesses.

It is a singular thing that people will lie when it would be to their interest to tell the truth, but

quite a large percentage of humanity is so constituted. The first impulse of a witness and of a litigant usually is to contradict unless he is repeatedly warned that all that is wanted of him is an honest statement of the facts; that the lawyer will deal with the case himself. If the opponent for instance testifies that he saw the client Saturday afternoon at the First National Bank the client will immediately state that this is not so and if he is not headed off will swear in his zeal that the opponent never saw him at any place at any time, while it may be one of the strongest points in his case to prove that that very thing is true—that the opponent did see the client Saturday afternoon at the First National Bank. Sometimes it is to be accounted for by a misunderstanding, sometimes by the surroundings. As has been suggested before, the situation is novel and the witnesses may not intend to tell lies but they do not understand the bearing of the matter and they will tell that which is either a lie or a great mistake. It is a most common occurrence for instance for a witness on the stand to insist that he has never spoken to a human being about the occurrence when it is common knowledge that he has talked with his own lawyer about it or with his friend's lawyer, if he is there for a friend. Asked, "How could you say such things?" he

will answer, "Oh, well, I meant that I did not talk with anybody else. I supposed everybody knew that I would talk to the lawyers." That is in many cases the explanation of his misrepresentation.

Some witnesses do not intend to be honest and it is an indication of their dishonesty when they will say even an unimportant thing falsely. The witness who will testify falsely to a very unimportant thing discredits his whole testimony and in discrediting his whole testimony he discredits the entire case, because the jury will say that if he lies in one particular he has lied in all and if that side must rely upon a lying witness doubtless all their witnesses are equal liars. So a single blundering witness or a single falsehood, even an unintentional one, by mistakenly giving a false answer to a minor question may injure the whole case. It at least gives the adversary an argument, whereas without it the adversary might have no point of attack at all.

In the preparation of the case in the office such things as writings must also be carefully examined. The lawyer should not take any other person's statement for them; should not take any copy or allow his client or any witness to tell him that there is a certain letter which contains certain things, or that there is a certain

contract with certain terms. He must demand the original, have it brought to his office and read it for himself. He will probably have difficulty in doing this but he will have still more difficulty if he does not.

A certain case was in court for several years with three sets of lawyers; when the case came to a final hearing the last lawyer examined the original instead of a copy and won the case. The case had been going for ten years upon a copy of an abstract of title, everybody assuming that the copy told the entire truth. But upon the final submission the last set of lawyers insisted upon examining the original back of the copy and in that were found a few lines which were not in the copy and which turned the entire case.

It must always be expected that the adversary is making the strongest possible move and the fact that a lawyer is looking at a copy can be no indication to him that his opponent is not looking at the original. If he finds something in the original that is not in the copy he will use it or not, as it serves his advantage. He is not there to furnish ammunition to his adversary. There is no duty, either in morals or in law or anywhere else for him to do so. If he should expose that information to the other side he would be subject to disbarment. He is not

there for that purpose. Each man looks out for his own side; so if one man has the original he will use it if it is for his interest, and he will not use it if he finds it is not. If a lawyer's clients have only copies and not originals proper steps should be taken to have the originals brought into court.

Every proposition advanced by the witnesses must be tested in the lawyer's office, first with reference to the circumstances which are known to exist, and second with reference to the statements made by other witnesses to see whether the statements made by this witness, compared with those made by the others are reasonable or unreasonable. If they are unreasonable statements there is something wrong. Either the witness is deceiving himself or is deceiving his lawyer or a prior witness is deceiving him. He must find out which is the truth. He cannot bring conflicting witnesses into court for they will ruin his case. He must see, if possible, that all the statements of things claimed by the one could have existed in view of the statements made by the other.

What may be deemed *weak points* must be found out in advance. For instance one witness gives an account of an occurrence and it is learned from the witness that he is brother of the client, a fact that is not self-evident because

their names are not the same. The client is a married woman and the witness is a man and hence their names are different, although they are brother and sister. Some witnesses deem it wise to hide that relationship. They think if it appears during the trial that they are closely related the jury will think their testimony biased; will think the witness is lying to help along or to shield his sister. All the facts as to their relationship should be obtained and candidly stated in the witness chair. It is better when the witness is testifying to establish in a quiet way that he is the brother of the client than it is to allow the cross-examiner to disclose it with the effect of making a great revelation. "Ah! You are the brother!" As much as to say, "Ah! gentlemen of the jury, that accounts for it all." It is better to bring out the fact naturally if it does exist.

If a point has been fairly well established by one or two plain-spoken, well appearing, good, strong witnesses, especially those in whom the jury has confidence, who are of good reputation in the community and entirely disinterested in the controversy, examination on the matter should be confined to those witnesses. It is a mistake to accumulate unnecessarily a great many witnesses on one point because some of the others, through lack of intelligence, may not

stand cross-examination so well as the first and may weaken the case all along the line. Especially if the proposition is not expected to be the crucial point of the case it should not be overloaded with witnesses because by giving it undue prominence and causing the jurors to think that that is the turning point in the case they will fail to be impressed afterwards with the real point of the case. If there is a choice of witnesses those should be accepted who are most pleasing to the jury. Without disparagement to men who frequently are worthy, it is advisable for instance not to call detectives if it can possibly be helped because a detective does not appeal to the sympathies of a jury. The jury have an idea that a detective is hired and that he will testify accordingly; that he will be eager to win for his side of the case and at all events will want to earn his fee and possibly thus ensure future employment. Of course the evidence of detectives is sometimes absolutely indispensable and if it cannot be avoided there are detectives and detectives, just as there are people and people in every community. There are detective agencies with a reputation in every community; men of upright character who inspire confidence and if it is necessary to have them at all those should be obtained who inspire respect.

That there is good ground sometimes for looking upon detectives with suspicion a small item taken from the Chicago Post some time ago will show.

"DETECTIVES GIVEN A SPUR."

Colleran Points to the Records, and Hints at More Telling Work.

Posted in a conspicuous place in the squad-room of detective headquarters is a list of the records of the detectives during the month of November. Captain Colleran again attended roll-call to-day, and told the officers what they would be expected to do if they did not wish to be transferred from the Central Station.

The record gives the total number of arrests, fugitives returned, and total amount of stolen property recovered. The following communication was read:

"*To Officers of the Detective Bureau:—*

"Please note the record for detectives for November. In looking it over you will see that arrests without conviction are of no account to this office. Criminal arrests are what we are after. It behooves some of you, if you wish a continuance in this office, to wake up and do public duty. That is what we are here for. If not, look out for a transfer.

"Luke P. Colleran,
"Chief of Detectives."

That is an indication to the detective that he must convict his man and if the jury had the information that this notice indicates—that the detective is bound to produce a conviction if possible—the jury would naturally think the detective was ready to go to any extreme in getting a conviction, even to the extent of telling a falsehood. It would weaken his testimony greatly.

The witnesses should be given to understand that they are to give the whole truth and nothing but the truth, but not more than the truth, because that may be injurious. Unfortunately there are instances where their misguided zeal has caused them to make exaggerated statements that bring ridicule upon themselves and injure the side of the case that called them. There is a case often quoted which goes something like this: A woman was claiming money from the estate of a deceased uncle, alleging that the uncle had promised it to her to pay for her services. She could not testify against the deceased, so a friend of hers testified but did not quite cover the case, because the Court held that under the circumstances there should have been an express promise, not merely an implication, and in the course of the arguments the Judge said, "If the deceased had said right here, in the light of these Missouri cases, that he would pay,

it might be different." The complainant's lawyer insisted that that had been covered and the Judge said, "Recall your witness." She had heard all the talk and the lawyer said to her, "Did you entirely cover that conversation that you told us about?" "Well, I heard that uncle say, 'And if in the light of these Missouri decisions you have done this work I will pay you!'" There may have been and probably was some talk about pay but the witness in her excess of zeal exaggerated and spoiled her evidence.

The witness should be given to understand that only the facts are wanted, the truth and no more and no less and in the plainest manner. Either A and B happened or A and B did not happen; but a witness must not be allowed to say "I don't remember," because this disintegrates his entire testimony. If a thing happened very long ago, naturally a witness cannot remember every detail but if it is a thing of recent occurrence the witness either knows it or does not know it. He should not be allowed to put off his lawyer with "I don't remember," or "It is so, to the best of my knowledge and belief," or "So far as I can recollect." He either knows it or he does not know it; it either happened or it did not happen. He must not hesi-

tate about any one point because this simply weakens his testimony on other points.

In the case of a witness who is very youthful, as part of his preparation for the court room it must be ascertained that he understands the nature of an oath and understands what he is going to do and if asked in court by the judge or by the lawyer, as to the nature of an oath, as he will be, that he knows what it all means. It is right and proper to instruct him if he has not had the instruction, or to get some competent person to instruct him, his parents or those of the same religious belief. A very young child who has never had his mind directed to such things at all, coming for the first time into a witness chair in the court room, gazed upon by a great many people is terrified and cannot understand—unless he is extremely mature intellectually—what is going on, and very important testimony is sometimes unnecessarily lost, simply from the embarrassment of the witness.

CHAPTER VIII.

PRESERVING THE EVIDENCE.

THERE are various ways to preserve evidence and bring it into court. One of the ways is by taking depositions. Witnesses cannot always be relied upon to come to court, especially if they live at a distance. So it is advisable to take their depositions in order that if they do not come the deposition will be there to cover the point. The point may not be a disputed one, but it has to be covered because if it is not covered there is a link missing in the chain of evidence and the case cannot be established at all. In a damage case for injuries, for instance, it must be proved that the horse and wagon which ran over the plaintiff belonged to the defendant. After it is proved the defendant will not contradict it but still it must be proved in order to establish the case at all. Now a point like that may be covered by a deposition, perhaps the deposition of the driver of the horse. He may have gone to a distant state and may not be present but his deposition, if it has been taken, may show that the horse belonged to the defendant and establish that point.

Many lawyers take a signed statement from the witnesses, and some take a sworn statement. Everything considered, it is advisable to take a signed statement from a witness. For instance a client comes into a lawyer's office and says that there has been a terrible calamity in his factory the night before. A large piece of machinery fell, and injured somebody. It is advisable then and there for the client to bring the witnesses to the lawyer's office and for him to go over the matter with them thoroughly, to get their facts, write them out, and have them sign their statement. Some even have them swear to the statement, which is rather meaningless, because an oath, under such circumstances has no legal effect. The advantage of having these statements is that the case may come on for trial perhaps three or four years afterwards; by that time, the witnesses may have become unfriendly; they may have left their employment, and may have some ill-feeling against the client. If they then appear as witnesses against the client and misrepresent the facts, statements which they themselves signed at the time may be used to refute them and to show what the facts really were, and in that way their testimony is defeated. It will sometimes be found that if the witnesses afterwards turn and want to defeat the client they will declare that

the statement they gave was not put down as they said it, but that the attorney and his stenographer took it down falsely. Some lawyers are careful to have the witness write the whole statement and sign it himself, so he cannot afterwards say someone put it down falsely. Even then a mendacious employé who writes and signs such a statement and later testifies against the client may declare that he was coerced under threat of discharge to write a false statement. Of course if that develops on the witness stand it is very bad for the client, even though it is untrue. So the matter of signed statements has its advantages and its disadvantages. However, everything considered it would seem advisable to take the signed statements; to take them if possible in the handwriting of the man who makes the statement and in the presence of some reliable, intelligent person as witness who can later show in court, if necessary, that the statements were properly taken.

In regard to a point which is apt to be contradicted while it is well to cover it by a deposition to be used in case of necessity it is much better to have the living witness in court than a deposition, assuming that the witness is one who makes a good appearance in court. If the witness is one who make a bad impression it is better to take his deposition because this can be

done quietly in the office of a notary. Sometimes people are extremely nervous and will therefore make a bad public impression yet they will make a very fine deposition if taken in the quiet of a notary's office.

In some states the law seems to be somewhat defective in this respect. Depositions are not allowed to be taken in all cases but only in those given in the statute, for instance if a witness is sick or about to leave the state. In the absence of such conditions depositions cannot be taken but if it still may be necessary to take the deposition, there is in some jurisdictions a process called the perpetuating of evidence, the taking of testimony in an entirely new suit, an original suit. That kind of evidence has been used with good effect in a case at law in this way. A man had been killed by falling machinery and the only witness who could give any testimony whatsoever about it was the engineer, at the time in the employment of the defendant. It was feared that the defendant would see to it that the engineer was out of the city at the time of the trial in order that the plaintiff could not subpœna him. So the plaintiff's attorneys immediately instituted this additional or collateral suit, called a suit for the perpetuating of testimony and in that suit took the testimony of the engineer and laid it away for future reference.

Their precaution proved to be well taken because when the case approached trial they were not able to find the engineer but by having this testimony they were enabled to force a very good settlement out of the defendant; whereas in the absence of that testimony the plaintiff would have appeared without any evidence and necessarily would have been non-suited.

If a witness is unable to speak English an interpreter should be provided in the court. Of course the benefit of the witness is lost if there is not an interpreter, and it is as much the lawyer's duty to have one present as it is to have the witness present. It is not the duty of the court to furnish an interpreter nor to wait until one is obtained. There are cases where very important testimony has been lost because it was to be given through witnesses who could not speak English and the attorney had omitted to provide an interpreter. The interpreter should of course be skilled because it is not every one who is able to interpret even though he is well informed in both languages. He has to be very ready and very accurate and a man of considerable strength of memory to catch what is said and remember it and repeat it accurately.

Preparation must be made from the office also that subpœnas are served, that the witnesses are found to be in attendance, that those who come

voluntarily are there and those who refuse to come voluntarily are forced to come by subpœna. It is a paradoxical truth that it is good policy not to subpœna witnesses who must be forced to come and to subpœna the witnesses who do not have to be forced in. It weakens the testimony of a witness when he seems too eager, too willing to come to court but if he is subpœnaed in, to the question, "Why are you here?" he can simply answer, "I was subpœnaed here." If he comes of his own accord it looks much as though he were eager to help that side, and although it should not be so it weakens his testimony in that regard. On the other hand a witness who does not want to come and is to his inconvenience forced in with a subpœna, is apt to get very angry about it and to take the first opportunity to escape. If the case goes over until the next day he will not come back unless care is taken to have an order of court compelling him to come back. And perhaps even when he testifies he will show antagonism. So it is well to try to get such a witness to come without a subpœna. Of course no general rule can be laid down which is not subject to modification with regard to the people who are being dealt with.

Notices to produce must be served if there are documents which have to be brought in. Copies

are not allowed to be offered or statements of the contents of writings unless a demand has first been made in such a way as the law requires, to have the originals there. If the adversary in a litigation has the instrument in question a notice to produce the original must be served upon him or his lawyers. But if another person, a person not in the litigation, has the original paper then a subpœna *duces tecum* must be served upon him, an order to bring with him the particular paper in question and the paper will have to be sufficiently described. This subject however is covered in detail in the books.

As has been said before, the presence of the living witnesses is to be preferred, if at all obtainable, to their depositions. Frequently the presence of witnesses in court and their appearance in court have great influence upon the jury. There is a story told which is perhaps not in keeping with the highest ideal of advocacy, but it is related of Rufus Choate, probably the greatest American jury lawyer of his time. It is said that he was defending a man who was sued by a woman, no longer youthful, who claimed that this man had agreed to marry her and had broken the agreement. While the woman bore traces of years the man was extremely youthful looking although he was well along in years and he happened to be of comparatively

slight stature. The story is that Choate caused him to be dressed in short trousers in a boy's suit with a large collar coming down over his jacket and shoulders, and presented him in that manner in court as though he were a mere infant, young enough to be the child of the woman in question. This story is printed on pretty good authority about Rufus Choate, but though it may have been an effective trick it is doubtful whether it is to be commended. There are similar tricks that will be found mentioned in text books and in popular treatises but some of them are woefully near improper practice and should not be commended. They should be guarded against when an attempt is made by the adversary to practice them.

A trick often resorted to in the case of a man accused of a heinous offense, murder for instance, is to have his mother sit beside him in the court room. There have been cases where it is said that great advocates have borrowed or hired a mother to sit beside the accused in the court room and look grief stricken. That comes very near deserving disbarment. Of course the defendant has the advantage. If he is found not guilty that is the end of it because the State cannot get a new trial. But if anything like that is practiced in a civil case and is found out and a verdict is obtained by imposition there is

no doubt that the verdict would be set aside. It might be urged that the man has the right to have some one sit beside him because if he had no mother he should have one; if his mother were alive or within reach most likely she would be sitting there with him, but that does not necessarily follow. So far as the proper management of the case is concerned it is no doubt the duty of the attorney to observe within the proprieties of his profession all those minor matters which appeal so much to the jury in such cases, but at times it may be overdone.

Injured people may be seen sitting in the presence of the jury and exhibiting to the jury the stump of the arm or of the leg where the rest of the member was sawed off by machinery or cut off by a car. This is held allowable and no doubt it is conducive to results; perhaps if it is not done the plaintiff will blame his lawyer if the verdict is small or if the verdict is for the defense. The courts have held such things permissible but in the writer's opinion they should not be permitted. They serve no purpose in enlightening the jury and are certainly merely for the purpose of exciting sympathy and prejudice. If a man testifies for instance that his foot was cut off at the ankle, and that he wears a wooden foot encased in a shoe, the jury cannot be enlightened any more by having him remove the

shoe and the wooden foot and show the stump sawed at the ankle.

Much preparation is necessary then in the presentation of the subject matter. For instance, the condition of the machinery, or the alleged defective sidewalk involved in the litigation may be in question. At the present time these matters are frequently reproduced in the presence of the jury by means of photographs. The lawyer should make wise provision in that regard if he has the opportunity. But time is required to do all these things. When the case is on trial it cannot be done; neither can the court wait to give the opportunity to do it then. The time to attend to all of this is when preparing the case in the office.

Sometimes provision is made for the jury to go and look at the locality in question. It is a very common practice in condemnation cases for the jury itself to determine to what extent a railroad has affected a particular street and the buildings on the street, and thus to estimate the damage done to the surrounding property. That has its advantages and its disadvantages. The side that is sure to win may ask to have this done because where the jury itself sees the subject matter the verdict given by them is rarely disturbed. The trial judge may not have been along, or if he was he is not a juror and what the

jury saw cannot get into the evidence, into the record, even by means of photographs and the reviewing court will say—"The jury saw these objects, so why should we say the jury made a wrong decision upon things which it saw, when we have never seen them at all?" Every presumption will be of the correctness of the jury's decision.

Parties at times display ponderous machinery before the jury, especially in patent cases. In one case 50 feet of rope about three inches in diameter were exhibited, which was rather absurd because the party who was interested in that rope need have shown only six inches of it and then let the imagination of the jury supply the rest. But that party presented that long rope and the reviewing court said, "The jury saw the rope and we did not," so they would not assume that the jury had drawn a wrong conclusion from the appearance of the rope.

In a recent case a stone weighing 135 pounds was brought into the court room. The question was whether it was a proper stone to form one of a series of steps. Fortunately the court took the case from the jury and the opponent must now get the stone into the record if he wants to take the case higher. The risk was taken because the defendant's attorney knew that this stone could be carried through all the courts if

necessary and he was satisfied that the jury would from the mere inspection of the stone say it was a suitable one. This seemed a proper thing to do because the witnesses were saying that it was very defective, that it was crooked and weak and so it seemed advisable to allow the stone to speak for itself. It was found to be a very good looking stone and the court took the case away from the jury. But nothing should be taken into court which cannot be used if the case goes the wrong way.

CHAPTER IX.

THE OPENING STATEMENT.

IN his opening address in court the lawyer must explain to the jury more fully than he did before, the nature of the case. It will be remembered that when the jury was chosen the attorneys explained to the jurors in a brief, general statement what kind of case it was; now the particular nature of the case on trial must be stated. The attorney tells them that he is for the plaintiff and he gives them an outline of what he expects to prove. He will state for instance that his client worked for a certain number of years for the defendant at a certain kind of work at an agreed price, that he received some pay and that the balance is unpaid. He will then give them the details of the circumstances.

After the plaintiff's attorney has spoken, in both criminal and civil cases, the defendant's attorney has the right to speak and to tell the jury in a brief outline what the defense is going to be. It is the law in probably every jurisdiction that the defendant's attorney may here do one of three things. He may open with a statement

of his defense, or he may waive the statement altogether or he may reserve it. He either tells what his outline of defense is or says he does not care to do so; or he waits until the plaintiff's evidence is all in or the prosecution's evidence is all in, and then makes his statement of the defense. That is permissible but care must be used in doing it. If the defendant's attorney says he waives his statement or in a vague sort of way says he does not care to make a statement he afterwards cannot make any. But if he says he reserves it he can make it later. There is a good deal to be considered in determining the manner of making the statement of defense and whether to make it at all or not.

As a general rule the defendant ought to make a statement because although the plaintiff has technically the burden of proof, sometimes he really has not much burden; his case is simply stated and practically is such that it can not be easily contradicted; but the defense is perhaps some entirely new affirmative matter. Now once more as to the plaintiff's statement: assume a case in which the plaintiff is injured by a railroad collision in which essentially the negligence of the company is not going to be greatly controverted, or the care of the plaintiff, or the extent of the injury; but it will eventually appear that the company relies on a release as defense.

In such a case the plaintiff's statement is a very perfunctory matter. But assume that the plaintiff's case is going to be resisted on all material points. Then the plaintiff's attorney should open the case clearly and fully and strongly for this reason: He has the burden upon him. He has to show to the jury that he is entitled to get money from the defendant, if it is a civil case, or that he is entitled to have the accused sent to prison or to the gallows if it is a criminal case. He must convince the jury of that; he has to build up the case; he has to start from the foundation and make the superstructure and the roof and the complete building; because if there is anything wanting in the edifice the jury cannot hold with him.

It is well known from experience how difficult it is to listen for the first time to a new reader or speaker, whose voice is a little different, to grasp thoroughly what he says. Now of the men in the jury box, one is possibly the driver of an omnibus, a person who can scarcely read, who has never heard any one read. Another one is perhaps a salesman, who of course is more accustomed to the ordinary affairs of the day than to continuous use of the intellect. Imagine then jurors knowing nothing about this logical structure that is going to be built and eight or ten witnesses, one after another, com-

ing up and describing something to them; rattling off their evidence when perhaps the court room is noisy, so that not one-third of what they say can be heard, much less understood. Such evidence as that is as hard for the average juror to follow unaided as an opera without the libretto. He must first get a clew to what is coming; then it is very easy to understand and very pleasant. A good, strong opening is a libretto. It is an explanation to the jury, in general terms perhaps, but nevertheless a clear and distinct outline of what is coming; and a good, strong opening will carry the jury even if they have not heard a word of the testimony, so long as there is no one to contradict it. The jury will believe that the testimony they hear is the testimony that the opener said would come.

The construction of the opening may again be compared to the building of a house. Of course there are exceptions to everything, but the general idea should always progress step by step in the most natural, logical and reasonable sequence. A house builder does not first hang the roof up in the air by props and then later add the superstructure and then the foundation. The foundation is first laid, then the main structure is erected and ultimately the roof. Last of all some ornamentation is possibly added. And

so in the statement of the case, ordinarily the earliest part chronologically should be stated first; that is where the matter started. Then the next step and then the next should be added in logical sequence.

Suppose for instance a very complicated murder case in which it is wished to show a motive for the homicide. The prosecutor perhaps starts in by saying that the accused is indicted for a murder committed in December, 1904. Then he would not properly say, "In July, 1904, there was a very serious quarrel between the accused and the deceased, and then, Gentlemen of the Jury, I should tell you that before that, some years ago, the deceased offended the accused by insulting a member of his family." That would be going backwards, building the house from the roof down and confusing the jury. He should start at the beginning: "This tragedy has its origin in the year 1901, at which time the deceased married the sister of the accused. They lived happily together for six or seven months and then bitter feelings arose between this husband and wife and after awhile we find that she commenced complaining to the accused of her husband; later more bitterness developed, etc." In this manner he should carry the sequence right up to the date on which the fatal blow

was given and the jury would grasp the entire affair.

An instance of a civil case may be given, a complicated case about a contract relating to land. The lawyer should start at the early negotiations; state that a paper contract was given with reference to them, but that when later somebody else offered to buy the property it was disclosed that the first statement made to the first purchaser back at the beginning was false. Then when he discovered that the first statement made to him was false he immediately made a demand to have his money returned. This is better than to begin by saying that the plaintiff served a notice on the defendant that he wanted his money back because a statement he had made to him three years before was not true. Going backwards in that manner confuses the jury. The case should be opened clearly and chronologically. That as a rule is the best way, for it ends the statement just where it is wanted to determine the present issue.

The statement should be plain, clear, concise, and the language have very few adornments. Anything in the way of oratory or pathos should be reserved for the closing argument. Its value is discounted by bringing it out too soon because it will fall flat when it is most needed. At pres-

ent simple logic is all that is wanted, simple information for the jury.

This is the general principle on which the plaintiff should make his opening, but of course it must be varied in accordance with the nature of the case and it is the duty of the advocate to use his material to the best advantage. So if the plaintiff has a very clear case where the sympathies and the evidence are for the plaintiff he should open to the jury fully. But if the client is an aged person or a crippled person with a very slim case prudence would dictate avoiding too closely accurate details and the opening should be more broad.

The opening for the defense is on very much the same theory. If the defendant has a strong defense, if he has a defense which is logical and clear and which he feels confident he can support with good, honorable testimony, and especially if there is much sympathy in behalf of the defense, it would be well for him to open promptly because he has nothing to fear. Besides if the plaintiff has opened his case and the defendant has not it gives the plaintiff the advantage that the statement of his case and of his witnesses comes unimpaired in the first instance to the jury, which tends at the beginning to create a very strong impression on the jury, one which it is afterwards difficult to overcome. If

after the plaintiff has opened his case and before he has called any witnesses the defendant, if he is sure of his ground, opens his defense and shows to the jury on what he relies, he discredits, as it were, the plaintiff's case and it does not go to the jury with such force as if the defendant had not opened.

On the other hand it is very frequently a source of danger to the defense to open, because it may expose the defense to the risk of the plaintiff's building up a part of his case from the defense itself, which otherwise the plaintiff could not do or possibly did not have the information to do. There may be some point missing in the plaintiff's own case which the plaintiff really needs from the defense; and if the defense is good enough to supply that point it helps to build up the case.

A case where the plaintiff is injured in a piece of machinery may be an illustration. It must be shown that the defendant was negligent in having that particular machine in that particular condition. The plaintiff is frequently helpless in that matter. He has not had the advantage of examining the machine in question, whereas the defendant has had that benefit. Now if the defendant opens and discloses the defense, conceding, for instance, that the particular piece of machinery was out of order for a

long time but claiming as a defense that the plaintiff gave a release or receipt against the injury the defense has actually established for the plaintiff the plaintiff's case; something that the plaintiff could not have established for himself, namely, the fact that the machinery was out of order and in what respect it was out of order.

Therefore, where there is nothing to gain by opening, and only something to lose, the defense should not open at all. The defense should not waive the opening but should reserve the opening, because then when the plaintiff is through and the plaintiff's case is all in, the defendant may give his opening address and to a great extent demolish the plaintiff's case, which is already in, by weakening the impression it has made with the jury, thus paving the way for the jury to receive more kindly and with more force what the defendant will then put in by his witnesses.

Very frequently the defense has little to gain by the opening after the evidence for the plaintiff is in. As a general rule the defense gains by reserving the opening, unless his innocence is unquestionable, in which case it is well to tell the jury so at once. A practical general rule is that if the defendant is guilty it is wise to be careful about the opening; to hear all that is possible and lie low. If he is innocent he cannot tell the jury too quickly.

CHAPTER X.

INTRODUCING THE EVIDENCE.

AN important point in the conduct of a case is the separating or excluding of the witnesses, in regard to which the practice differs in different jurisdictions. Some hold that the request to exclude or separate the witnesses, to "put them under the rule," as it is technically phrased, must be made immediately at the beginning of the case; that is even before the opening statements are made. Others have the practice that the motion shall be made immediately after the opening statements and before any witness is called. Still others have the practice that either party may make the motion; for instance before the plaintiff puts in his witnesses the plaintiff may move the court that the witnesses be separated and if the ruling is favorable all the witnesses go out, both the plaintiff's and the defendant's, except the chief witness on each side, who remains in. For instance the plaintiff himself remains in, the defendant himself remains in or if one of the parties be a corporation some person stays who represents the corporation.

In some jurisdictions if the motion is not made then by either side the plaintiff puts on his own witnesses; then, when the defendant calls his witnesses the plaintiff may move that they be separated. In other jurisdictions however if the plaintiff or defendant fails to make the motion in advance before the plaintiff's witnesses are heard neither party can make the motion after the plaintiff's witnesses have been heard. The Court would not exclude the defendant's witnesses if the plaintiff's witnesses were not also excluded.

If the witnesses are excluded it means of course that each one shall testify without hearing the others. Suppose however the witnesses are sent out but the plaintiff who is an important witness remains in the court room. Now if the plaintiff calls first an outside witness this to some extent overcomes the separation of witnesses because if that witness testifies first the plaintiff hears what he has to say and gets the benefit. So if the plaintiff is in the court and his witnesses are out and he is about to call other witnesses the defendant should move that the plaintiff testify first in order to get the benefit of the separation of witnesses. The granting of this motion rests somewhat on discretion, and in some jurisdictions the Court will say that he cannot control the manner in which the plain-

tiff shall call his witnesses and will refuse to entertain the motion. In some jurisdictions however it has been held error not to grant that motion for the reason that the separation of witnesses has been overcome as has been shown. At all events whether it is error or not error or whether the Court will grant the request or not the defendant ought to make the motion because if the plaintiff insists that he will not testify until his witnesses have testified he thereby weakens himself materially before the jury because this is equivalent to saying to the jury that he is afraid to testify before his witness does for fear he will contradict his witness.

The separation of witnesses may be of vast benefit, though as with many other things this depends somewhat upon which side of the case a lawyer is on. If he has a case in which he feels that he is undoubtedly in the right and yet fears that the opposition may defeat him by a mass of witnesses most of whom possibly are crooks and perjurers he should by all means invoke the rule. If he feels clear and strong in regard to his own witnesses, that they are telling the truth and that any one who opposes them must necessarily be false he should see that the witnesses are separated, because in this way he gets the best chance of exposing a liar. Sooner or later those who are telling lies and who do

not hear their confederates' stories will contradict each other. Of course under these circumstances contradictions in the important and essential parts of the story will seldom be found because liars are usually shrewd enough to tell a pretty good story. They have it arranged beforehand so that to a certain extent it will tally; but sooner or later they will be caught and there is a better chance of catching them in something if they are kept apart than if they all sit in the court room and listen and learn how those who preceded them evaded the cross-examiner. Even though the liar is not caught directly he will be caught indirectly because those who are outside do not know what is taking place inside and they will be afraid when they come inside to say either yes or no for fear of being contradicted. They will say, "I don't remember," or "I ought to know but I don't know," and finally they will say that they do not know something which they must necessarily know if they are telling the truth. If they are not caught in a direct contradiction they will be detected in an indirect contradiction. The more stupid ones will be caught in the indirect contradiction and the more crooked ones who are eager at all hazards to carry their side through will be exposed by the more flagrant contradictions.

It is well also if possible to keep the witnesses

in the court room before the case is reached so that they will become accustomed to the surroundings. They may see how other cases are tried and overcome the stage-fright which any witness unaccustomed to court-room work suffers when first called into the witness chair. The warning may be repeated which has been given before; to instruct the witnesses to tell the plain, straightforward truth and to answer questions as they are put without feeling that they are obliged to be the attorney or the advocate. Some witnesses seem to think that because they testify for a side they must help to win the case and in their zeal they do more harm than good. It should be impressed upon them that they are simply to tell the facts and above all that they should not attempt to be smart or glib or anything of that kind. Efforts of this sort make a poor impression and have a bad effect on their side.

If the witness is badgered too much by the cross-examiner the natural sympathy of the jury will be aroused in favor of the witness. He need not attempt to fence back; a trial is not a fencing match between the witness and the cross-examiner. If the witness is badgered to an unendurable extent his judgment will usually suggest in the most natural manner a pertinent and proper answer without any effort on his part

to be smart or to adopt such language as the lawyer addresses to him.

The instruction may also be repeated to prove propositions when possible by one's own witnesses. The adversary's witnesses should not be called upon unless it is absolutely necessary.

It is well sometimes to have influential people to testify, for instance when a man is being defended who is accused of crime. It is advisable to call his friends to the court room to testify that he is a man of good character. This may be an aid to him because according to law the jury may say that if he is a man of good character it is not likely that he committed the crime. It is an element by way of defense. Directly it may not count for much in that regard because if the evidence is strong that he committed the crime the jury will probably think that he did, character or no character, but indirectly it amounts to a great deal especially in small communities. Suppose for instance that in defending a man accused of a crime some ten or twelve of the leading citizens of the city, who know the client, come into the court room and testify that he has always been a man of good character. Indirectly this influences the jurors to believe that a man who has so many influential friends must be a pretty good sort of a

man and if the case is close that may decide in his favor; if the case is decidedly against him and it is a question of punishment they may give him a milder punishment. They think a great deal more of him if worthy people believe in him than if he is there without any friends in the world, as a mere tramp and a vagabond. Furthermore among those twelve influential men who are brought into the court room there may be some who are very friendly with some of the jurors. Some of them may be employers and some of the jurors may be working for them. At all events there is a manifest advantage in vouching for the good character of the client and inducing the jury to give him all the consideration they possibly can.

All these things are part of the manœuvring of lawyers, to which they are obliged to resort, to win their cases. Some of them may appear to be trickery; they may seem to be taking undue advantage; but under the present system it is a lawyer's duty to employ them because his opponent is doing the same thing and if he refrains from doing so he is violating his duty to his client and giving his opponent an unquestionable advantage.

Care should be taken to put the evidence in just right; not too much, not too little but carefully and to cover each point. A case that re-

cently happened in court is a very good illustration of the careless method frequently employed. A railroad company was being sued and its lawyer had proved the running of the trains and the schedule of the trains between certain stations. He had a small printed pamphlet which the railroad company issued, giving time tables and various other information, and he was trying to offer the schedule in evidence. Strictly speaking it was not evidence and the plaintiff's lawyer objected. The railroad lawyer persisted saying that he was willing to allow the little book in its entirety to be in evidence and the plaintiff's lawyer in an offhand way finally said: "Very well, let the whole book be in evidence," and the whole book was put in evidence. The case was finished and in the argument the plaintiff's attorney stated that it was a shame that so rich a corporation with $20,000,000 of stock should hesitate to pay this poor victim a few hundred dollars. The defendant's lawyer objected that this was not fair, whereupon the plaintiff's lawyer picked up the pamphlet and referred to the advertisement of the railroad company on its back which stated that the company had $20,000,000 of stock. He had a right to argue this because it was in evidence and it had an undoubted effect upon the jury.

When an adversary is putting in his evidence

and does not know how, he should not be helped with it unless he omits something that the other side needs. Suppose for illustration that a widow and children, who always command the sympathies of a jury, are suing an insurance company. In a case like this any defect in the defense will be turned to the plaintiff's advantage because the jury is eager to find in their favor. Suppose that the man committed suicide and that the company claims it therefore does not have to pay. The plaintiff's lawyer will then claim that although he killed himself he was not sane at the time and hence not responsible. Under the form of policy if he took his own life without responsibility—being insane, the policy remains good. Now the defendant in such a case puts a medical witness on as an expert and asks him: "Doctor, supposing so and so, then in your judgment was the man sane or insane?" Of course it is a foregone conclusion that the medical expert, being there for the company, will say that he was sane; whatever questions the plaintiff's lawyer may suggest, his answer will be the same. Suppose now that the important points in the case on which to determine sanity or insanity are six, but the defendant's lawyer, in putting the hypothetical question to this doctor puts in only five points. The plaintiff's lawyer, if he is wise will keep quiet

and let it go at that and then in his final argument for the plaintiff will say:

"Why, Gentlemen of the Jury, of course Dr. Blank for the defendant testified that in his opinion the man was sane; but you will remember that the question put to him—and you may read it yourselves if any one disputes me; I will read it from the stenographer's notes—you will remember that the question put to that doctor covered only propositions one, two, three, four and five, and on those propositions the doctor said he was sane. Suppose, Gentlemen of the Jury, they had put to him the proposition number six. They did not dare to put that to him!"

The doctor's testimony is thus overcome. But time and again in such a situation the plaintiff's lawyer makes the mistake of objecting that the doctor's testimony does not cover the sixth proposition. "All right," the defendant's lawyer then answers, "Suppose, doctor, it includes that one also, then what do you say?" And the doctor of course says, "I still say he was sane."

It has been suggested before that it is well to know in advance the nature of the witnesses who are to appear on the other side. In criminal cases it is the rule in most places that they have a preliminary examination. Ordinarily the names can be obtained from the indictment but generally the witnesses are examined before a

magistrate on the preliminary examination. In defending an important case it is desirable to appear and cross-examine all witnesses for the State, the prosecution, because in this way many facts can be learned from those witnesses which are of help afterwards if the case is tried in the trial court, in finding suitable jurors, and of help also in cross-examining those same witnesses in the trial court. By cross-examining them before the justice the nature of the witnesses can be learned and how firm and how truthful they are. Experiments can be tried also in the justice court; they can be asked questions even if they turn out to be harmful because later in the upper court the same questions can be avoided. On the other hand if helpful answers are obtained it is safe to put the same questions to the same witness in the upper court. If the witness there testifies differently or does not answer as he did before the justice, the reporter or stenographer who heard him testify in the justice court should be produced to impeach him and show that he has sworn differently before the justice, which will weaken that witness materially and weaken the whole prosecution.

Naturally, on the other hand, in defending a criminal case it is advisable not to put the witnesses on at all before the magistrate because this gives the prosecuting attorney the recipro-

cal advantage of cross-examining them. Of course if there is an absolute certainty that a client can be cleared even before the examining magistrate it is well to clear him and save him from the disgrace of being tried and lying in jail and also from the expense of giving a bond. But it is only in a very strong case that it would seem advisable to put in any evidence at all for the defense. As a general rule it is best to give no evidence, to allow him to be bound over in bail and then to formulate the strongest defense. Certainly it may be a disgrace for a man to be bound over to the Grand Jury and to be indicted but for the defense it is safer. It is very much as though the defense were playing cards with the State's Attorney. Before the justice the defendant's lawyer sees practically all the cards that the State's Attorney holds but the prosecution does not see the cards that the defense holds. Naturally before the trial jury the defendant's lawyer has that advantage; whereas if the State's Attorney sees his adversary's hand he has an equal advantage. The chances are nine hundred and ninety-nine out of a thousand anyway that the justice will hold the accused over. There are very few cases where the justice releases the accused on the preliminary examination because it is the duty of the examining magistrate to hold him over if there is probable cause, not if

there is guilt beyond a reasonable doubt, or a preponderance of the evidence, but only probable cause. There is probable cause where the prosecuting witness swears that the accused committed certain offenses even if the accused swears he did not, because the question who is telling the truth is for the jury and not for the justice to decide.

In offering evidence, if the question which has been asked the witness is objected to and the Court sustains the objection then the witness is not allowed to answer that question. The Court sustains the objection and the lawyer for the side which has called the witness takes an exception, but that is not enough. It is the general practice in all the jurisdictions that have ever come under the writer's observation that when a lawyer asks a question and his opponent objects, and the Court sustains the objection, he must then go on and indicate to the Court what he expects to prove from that witness with reference to that question: He must indicate that and get it into the record; the stenographer must take it down, if he has a stenographer. The technical and accurate process is as follows (and some of the reviewing courts are very technical) Question to the witness, objection by opposing counsel, objection sustained, exception by the questioner who says, "And now, your Honor, I

offer to prove by this witness, and expect that, in answer to the question I have put, this witness will testify A. B. plus C. D. Now with my offer of the expected testimony, if your Honor please, I renew the question in the light of this offer." Objection by opposing counsel, objection sustained, and again exception by the questioner. If there is an absolutely complete record of this sort so the reviewing court can see that the question if it had been allowed and had been answered in the manner that it was expected to be answered might have produced the result it was expected to produce, if the reviewing court can see that with that material in the record the result might have been different the case will be reversed.

But if the procedure is simply question to the witness, objection by opposing counsel, objection sustained by the court and exception by questioner who drops the matter there and goes on with the case, if the case is lost and later appealed it will not be reversed because of the court's refusal to allow that question to be answered. The reviewing court will say, "We cannot tell that that made any difference. We cannot tell simply from the putting of the question and the refusal to have it answered that that affected the case in its entirety; we will not reverse it because it is the duty of the losing

party to persuade the reviewing court that the case in its entirety was affected by the alleged error of the trial court." The reviewing court might well say that the question should have been answered and that for the court to refuse to allow it to be answered was error on the part of the court but it was error without prejudice; it does not appear that there was any prejudice suffered by the question not being answered because it does not appear what the answer would have been, or might have been; the lawyer putting the question has not enlightened the lower court in that regard and hence has not enlightened the reviewing court.

Care should be taken, as has been said before, that the jury is not disappointed in the promise of evidence. If they are led to think that some important matter of evidence is coming, which later fails to come, they think that the case has not been proved although there may be other evidence in the case which should be enough to convince them. An apt illustration of this occurred in a trial some years ago. The prosecutor stated that he would prove that the accused bought the revolver from a merchant, whom he would produce as a witness. He made such a point of this that everybody was in the utmost suspense when this witness was called and the accused clenched his hands in dread as

he turned to face him. It was a very unwise thing to rest the entire case on that one proposition because it might be unimportant whether he had bought the revolver or not. There might have been enough evidence to hang twenty people regardless of that point but a great feature was made of it and when in answer to the question "Could you say that this is the man?" the witness replied "I could not," the whole case stopped right there. That was enough to disappoint at least six of the twelve jurors. The State's Attorney should have had the merchant look at the accused outside of court and unless he had then been able to identify him, he (the merchant) should not have been called as a witness nor should any allusion to him have been made to the jury.

Sometimes a witness says he can testify to a certain matter, and later in court fails to do so. In that event it is the duty of the prosecutor to tell the jury frankly that that witness has been deceiving him, which is permissible. If the witness tells the prosecutor for instance that he can identify the accused, saying, "He is the man I saw buy the revolver"—and then when that witness is called on trial and says he is not the man it is the duty of the prosecutor to say, "Mr. Witness, did you not tell me in my office that he

is the man?" and to produce a witness to prove that in the office he did so say.

In regard to the order in which the witnesses are to be called as a general rule it is well, as has been said, to start with the earliest facts and bring them down to date, like a history or a novel. This makes the matter clearer and plainer to the jury and they follow the case more easily. Begin with the earliest facts thus: "Back in 1850 there was a family living out in the town of Blank and that family had a son James. About 1864 he went to the Civil War and he was not heard from again until 1872 when he was found keeping a tailor shop in Boston," and so on right down to date. The jury follows everything and the witnesses are called in that order to establish the facts. But this general rule admits of a great deal of modification. At times witnesses are stupid and cast more or less ridicule upon themselves, on the direct and cross-examination and it is not well to end a case with a weak witness. The last impression is the strongest, so it is well to keep the clearest, strongest and best evidence until the last, even if this slightly shifts the chronological order. The witness who makes the strongest sympathetic appeal is often left until the last, the widow in a suit by the administrator if her husband was killed or the afflicted mother whose son perished

in an accident. There is not the slightest doubt that the mere presence on the witness stand of the afflicted relative, even if her testimony be upon a comparatively minor question, aids in drawing the kindly feelings of the jury towards that side of the case. Those things must all be borne in mind in arranging the work.

Sometimes the witnesses must be taken as they can be gotten; possibly they are not always at hand. If there are a good many depositions to be read they should not be read first but should be saved for emergencies if at any time the witnesses give out. Lawyers sometimes make the mistake of reading all the depositions and then run out of witnesses before adjourning time and their other witnesses not having arrived they have to take a non-suit. All these are matters of detail but they are important at times.

It is obviously highly important in offering evidence to see that the evidence is consistent and to know what it is necessary to prove, but it is surprising how many lawyers fail in both regards.

The issue involved must be known, and the nature of the proof and how much evidence is needed to establish it. In other words the issue, the burden of proof and the quantum of proof. The burden of proof is the necessity to prove;

the quantum of proof, the weight or mass of proof necessary to establish the burden. The quantum of proof varies on different issues; in some it requires the preponderance of evidence, in others satisfactory evidence, which is a little more than preponderance, and in others evidence beyond a reasonable doubt, which is the greatest amount of evidence demanded. Sometimes the plaintiff must prove the proposition; sometimes he has nothing or little to prove and the defendant must do the proving. These questions must be known when preparing a case.

Suppose the plaintiff sues upon a note; the plaintiff does not have to prove who signed the note unless the defendant, in some jurisdiction by pleas and in other jurisdictions by an affidavit, puts the signature into issue. In this case the plaintiff has to prove the signature. It would be absurd, if that issue were not upon the plaintiff, for the plaintiff to commence proving the signature as though he were afraid of his own note. If some of his witnesses should be a little weak the jury might become suspicious of the note and if there were some other defense in the case they would decide for the other defense because of their impression that there was something wrong about the note. If the defendant did not put the signature into issue it cer-

tainly would be a great mistake for the plaintiff himself to do it.

It is not always easy to determine what the issues are. For instance in some cases sanity or insanity may be the issue, as in the insurance case which has been cited before. If the plaintiff sues on a contract and the defendant wants to avoid the contract on the ground that the defendant was insane then the burden is on the defendant. If the plaintiff sues on an insurance policy and the defendant claims the deceased killed himself, which is admitted, but the plaintiff claims that he was not responsible at the time because he was insane, then the burden is on the plaintiff.

Burden of proof must not be confused with presumption of proof. Sanity for instance is supposed to exist. All human beings are assumed to be sane, though it is a violent assumption in some cases, and hence in the absence of any evidence at all the individual in question is assumed to be sane and evidence is required to show that he was not sane. Just as in a criminal case the State must prove that the accused did the act and that the accused was capable of doing the act or else there is no crime, while the accused is assumed to be innocent until he is proved to be guilty, so sanity is assumed to exist until it is overthrown by evidence.

One of the most interesting questions of issue and the fixing of the burden arises under the principle of *res ipsa loquitur*, which applies where the affair tells its own story and no other evidence is necessary. Thus if a man walks along a street and a large bundle falls out of the window of the fourth floor of a store and hits him on the head and injures him, all that he must prove is that he was walking along the street and that the bundle fell out and hit him. After that the affair speaks for itself; it tells its own story, that somebody upstairs neglected something in allowing that bundle to roll out of the window and must be made to pay the damages. The assumption is that the matter is entirely under the control of the owner of the store, which matter, if properly conducted, would ordinarily not injure people and as this matter has injured somebody it has therefore not been properly conducted. So the burden is on the defendant to prove such matters as indicate that he properly conducted his business and that nevertheless the injury happened. For instance he will say that he had merchandise up there pressed against the window, which is true; that he needed the space, which is true; that across the window he had put solid iron bars two inches square that would hold thousands of pounds; that he bought these bars from a foundry com-

pany which made the best bars in the United States and paid the highest price for them; but that suddenly and without warning one of the bars broke and his goods fell out of the window and caused the injury; that he went then and looked to the bar which had broken and found that externally it was perfectly sound but internally there was a defect in the casting and that the makers of the bar would say that the best casting in the world might have that defect; they cannot look into it and they have to take that chance.

It is barely possible that in such a case the foundrymen might be liable but the owner of the store has neglected nothing; he went to the best foundry, paid the highest price, bought the best article and put a light weight against it and still it broke. Under these circumstances the merchant would be released; he would not be liable.

In this way the doctrine of *res ipsa loquitur* establishes a case until it is overcome by evidence which thus overthrows it. This principle is very frequently applied in railroad matters. In a typical case the plaintiff was a passenger on a car which ran off the track, fell over and injured him. He need prove no more. The doctrine is that a car properly managed will not ordinarily fall over; hence the inference arises that the car was not properly managed.

This applies where the entire operation is in the hands of the defendant and so if one car belonging to a railway company crashes into another car belonging to the same company the passengers recover because of this doctrine, unless the railway company can show that the occurrence took place from some reason beyond their control; that is beyond the exercise of the utmost care on their part consistent with the practical conduct of the road; for instance that they examined the brakes, wheels and everything but to their surprise one of them broke by reason of an interior defect and thereby caused the accident. In the case however of a car coming from one direction and a team coming in the other direction and injuring a passenger, it is held that it may just as well be said that the man with the team drove it carelessly toward the car as to say that the man controlling the street car drove it carelessly past the wagon. It is not self evident which one was to blame and hence this doctrine does not apply.

In bringing suit for the injured man against the railroad company where the car ran off the track and the passenger was injured the case will be brought like this. The passenger complains that while he was a passenger the company negligently caused the car to run off the track and injured him. It will be proved that he was

a passenger and that the car did thus and so broke his shoulder and he will win unless the company makes satisfactory explanation. The plaintiff may then attempt to say, "But there was something else; the car was coming around a corner too swiftly," but the plaintiff cannot bring that in because it is not rebuttal.

There is where the evidence must be watched. The plaintiff should have put in that line of evidence when he opened his case. If the plaintiff narrows his case to the mere application of the doctrine of *res ipsa loquitur* and the defendant overcomes that then the plaintiff has lost. The plaintiff can rebut then only upon the point offered by the defense; for instance if the defense goes on the theory that the wheel broke, that they had bought the wheel from the best maker, and so on, the plaintiff can rebut and show that instead of buying that wheel from the best maker, etc., it was a poor wheel, a discarded wheel which the company bought from a scrap pile and put on the car. This would be rebuttal of that line of defense and would be allowable, but under those issues that is all that would be allowable.

So great attention is necessary to show just what the issue is in the case and just exactly how to prove it.

It may be that under the general count of the

declaration that they negligently ran that train, evidence can be introduced as to the running of the train and of some circumstances attending upon that without a special count in the declaration. For instance it has been held in some jurisdictions that under that general count may be introduced the fact that the track was slippery from rain, and that the engine or grip car had no sand and did not sand the track, although these specific facts were not specially charged in the declaration. That was held to be one of the circumstances under which the car was run, indicating that it was negligently run. The question however would be doubtful in many instances and in some jurisdictions evidence of that kind would not be permitted to be offered. Certainly it would not be allowed to offer evidence of the special violation of a special law in the general count in the declaration, as for instance that the company had no flagman stationed there or that the company did not comply with the ordinance with reference to railway gates and such matters. There would have to be a count based on that.

So the proof under the doctrine of *res ipsa loquitur* is quite narrow. In the Illinois Court now it is narrower than ever before for they have quite recently—and in the writer's opinion quite erroneously—reversed the decision of the

lower court and the Appellate Court. The person injured was standing on a public highway which was crossed by a railway track. A railway train went by with cars loaded with timber. The timber had turned on one of the cars so that one of the pieces was at right angles to the car and projected a considerable distance. The man at the crossing was struck by the end of the timber. The Supreme Court held that it was incumbent on the plaintiff to prove how the timber came to turn and to project from the car.

Many elements are assumed to exist until proved to the contrary. Sanity is supposed to exist; sobriety is supposed to exist; carefulness is supposed to exist in regard to parties who are otherwise deprived of their proof. An illustration of the latter assumption may be found in this case: A man was found dead; nobody had seen how it happened; he evidently had been killed by an engine or a car on the railroad; there were no witnesses; there was evidence that he usually was careful and hence the court held it might be presumed that at the time being he was also careful. However care must usually be proved affirmatively; that is, all the circumstances must be related to the jury by those acquainted with them and the jury may infer care or lack of care.

The various kinds of cases must be carefully studied to find out where the burden of proof is and the manner of proof. Suppose for instance a client has sold the defendant a great many articles of merchandise. His lawyer must prove that the contract was made and that the articles were delivered and what the market or agreed price of such articles was, which is not always easy. If the client has a large establishment, employing thousands of persons, salesmen and clerks and shipping clerks it is often difficult to prove a sale and delivery where the system of jurisprudence requires it to be proved. The better way would be to require the defendant to deny under oath that the goods had been delivered. In most cases he could not deny it but under some systems he is allowed to plead the general issue and under it deny that he got the goods. Then the plaintiff must prove that he did get them which is very difficult and it would be well for the lawyer to instruct his client how to make proof of that. One of the ways is for the client to send a statement to the defendant of the items and amounts when the goods are sent or soon after. The defendant at that time probably admits the justice of the statement, or if he denies it he will deny only one or two particular items. It has been held that this is sufficient proof; the sending of the statement

and the receipt of it and the acquiescence therein or failure to write back that he did not receive the goods.

Also it is necessary to learn how to prove book entries. The entries may be wrong or the man who made the entries may be dead. The statute must be consulted in the particular jurisdiction to see the manner of proving such entries. The general principles however underlying this are about the same everywhere. It must be proved that the books were kept in the usual course of business, that they were honestly and correctly kept and the inability to produce the man who made the entries, either on account of his death or for some other cause must be proved. And the original entries must be proved. It is the original entries that count not the subsequent entries and it is very difficult sometimes to know just what are the original entries. Suppose in a large lumber concern a man goes out into the yard and makes a small list of items on a slip of paper which he gives to the book-keeper who enters the items in a day-book and later transcribes them into the ledger. The ledger is not a book of original entry at all. Back of the ledger is this journal or day-book which many deem to be the book of original entry while others hold that the little slips which the man brought in from the yard are the original entry.

The journal is simply a copy of those slips. There is a great deal of conflicting authority on these matters and it must be examined very carefully.

Another difficult class of cases is mechanic's lien cases. A great deal of law must be examined there concerning how to prove for instance that the client's lumber went into a certain building.

It must be learned exactly what kind of evidence is admissible and what is not. The distinction must be noted between hearsay evidence and other evidence, evidence relative to the *res gestae*; evidence which is the best evidence and that which is secondary evidence. How to bring evidence into court must be learned; whether by notice to the opponent to produce a document or if it is in the possession of a witness by a subpœna *duces tecum*. If the opponent has the document, notice must be served on him to produce it in court. If he fails so to do the lawyer has the right to have any of the witnesses who possess a copy produce it or if the witnesses have no copy but know what was in the original the witnesses may testify as to the contents thereof. He has made a reasonable endeavor to bring the document into court, and if it is not brought in he has a right

to give secondary evidence. If the document in question is not in the control of the opponent in the litigation but is in the possession of a third person, the third person may be a witness the same as anyone else, and if he is wanted in court as a witness to produce the document he must be subpœnaed under a *subpœna duces tecum.* Then he is required to come into court and bring the documents. If he is in the jurisdiction and does not appear he may be compelled to come by attachment and a continuance must be obtained until he does come. But if he is out of the jurisdiction the court cannot compel his attendance and that is ground for secondary evidence. Some courts hold that if the witness is outside of the jurisdiction an attempt must be made to take his deposition. Other courts hold that it is not necessary to make the effort in such cases at all; the mere fact that he is beyond the power of the court allows secondary evidence to be introduced.

Every step should be taken in time and followed with diligence so that when the case is announced for trial, if it should happen that the witnesses are not present it can be shown that it was through no fault of the lawyer. In that way the basis for a continuance will be laid and the case will be heard later.

CHAPTER XI.

EXPERT EVIDENCE.

IT is not well to have too many experts on a side. Sometimes it is not well to have more than one. Sometimes one expert is better than two because occasionally although in their general conclusions they agree in favor of a client yet they give such different reasons for their opinions that they practically contradict each other. Suppose that two experts testify that a certain party involved in a transaction was not sane at the time. On cross-examination one expert will give his reasons for deeming the man insane as a, b, c, while the other expert on cross-examination gives his reasons as d, e, and f, quite different from those the first expert gave. The opponent will not fail to make the argument that neither opinion amounts to anything because if a, b, c, are good reasons on which to found insanity it is very singular that the second expert did not put them down as his reasons; the fact that the second witness did not give them would indicate that they are not good reasons; likewise if d, e, and f, are good reasons it is singular that the first expert did not give them.

Therefore, both experts base their opinions on reasons which are not sound. In other words the witnesses defeat one another and it frequently happens that the more experts there are on the same side of the case the weaker the case gets because as witnesses they are as a class opinionated and will persist in their individual reasons although they reach the same conclusions.

On the other hand it is well to have a number of witnesses, provided they are consistent and can stand the test of inquiry, because if an attempt is made to establish a proposition with only one expert and the opponent has six who are consistent and make a good impression, naturally the jury will find with the six rather than with the one. To some extent they are compelled to do so.

The forms of questions to be put to the expert are rather difficult to determine. They vary so much in different jurisdictions that the law must be looked up wherever a man is practicing and it must be verified from time to time because the courts are shifting.

But this much is safe in any jurisdiction; the medical witness after he has stated that he is experienced, has attended college, and has had so many years' experience, can be asked directly what in his judgment was the result of the accident; that is, what in his judgment was the re-

sult of the blow, describing it, if the man did receive such a blow. In this way he is giving his positive assertion that the blow, as such, resulted in the present condition of the plaintiff whatever his condition is. The doctor has a perfect right to give that as a fact because he gives it as a fact based on his opinion and on his experience and knowledge as a physician. He has a right to answer that, because it is based on his judgment as a physician but all things which are based simply upon deductions of knowledge and observation are to some extent a conclusion, a point that has been explained before.

No forms that have been given thus far can be followed unvaryingly but they must be adapted to the particular case. Great care must be exercised in preparing cases to get these questions just right. Some of the best results have been made worthless by a slight inaccuracy in the question. A judgment for $15,000 was reversed recently simply because of a slight error in the wording of a question which probably did not affect the jury in the least but it was deemed a flaw in the record.

There are some instances where it would be a proper question to ask the doctor to state whether or not in his opinion or in his judgment as an experienced physician or surgeon the present condition of the plaintiff resulted from

the above described blow. This would apply for instance in a case where there is no contradiction as to the nature of the blow, or of the statement that nothing else happened to the man. In other cases it might be denied that any blow happened at all or it might be argued that something else affected the man. There the question in the form above would not be allowed. All the contingencies have to be taken into account before the question is formulated.

When experts are put in they should be given to understand that they should make themselves plain to the jury. In a recent case a physician was called to give evidence in regard to a certain injury and the testimony of the physician was as follows: "Anterior to the right parietal eminence, running parallel with the coronary suture into the squamous portion of the temporal bone, there is a fracture of the bone as long and as wide as the finger. Its edges run parallel to each other and are slightly arched with the convexity posterior; the anterior is sharp, the posterior depressed. On the inner surface of the skull the vitreous table is detached and the dura lacerated. In addition there are found between the latter and the internal meninges a thick layer of blood coagula." It appeared that the subject had been kicked in the head by a horse. To put it to the jury in

that way was not only meaningless to the jurors but it perhaps brought ridicule on the witness who employed the stilted phraseology. The expert must use plain English to the jury. If he means that the man was kicked in the head by a horse at the right temporal bone he can say, "The man was kicked in the head just about half an inch back of the outer corner of the right eye, between that and the ear, in what we physicians call the temporal bone." The jury can understand that. It is well to describe a thing if possible in ordinary language and also in medical language; to describe it in the ordinary language to the jury so that the jury will understand it and in medical terms for the sake of the record. Suppose some of the medical witnesses have been on the stand, have described the injury and have left the court room and afterwards the medical expert is brought in and is asked for his opinion on the case. He reads or has someone give him the testimony of the other medical witnesses and if they gave their testimony in medical terms the expert can deal with it understandingly because anatomy is as exact as the geography of a country or city. One medical witness used for instance the terms, "Anterior to the right parietal eminence," another medical witness coming into the court room six days later knows exactly what is meant because he can

locate perhaps within a tenth of an inch where the pressure took place on the skull. The exact location may be very important because if the skull is depressed at one point it affects certain nerves and may have certain results, paralysis of certain organs or members, or thought functions, whereas if it is a trifle removed, entirely different symptoms and entirely different results may be expected. So for the sake of making a record and for carrying on the investigation accurately in the future stages it is highly important that the medical witnesses deal with precision with the medical terms no matter how long they are. However they should avoid the appearance of wishing to display their knowledge and avoid giving the impression that they are dealing in matters too learned for the jury. A physician in a recent case said "*levator labii superioris et alique nasi,*" which in plain English means a small muscle which tends to raise the upper lip under the base of the nose. To the ordinary juror it would be better to say, "This small muscle, which raises the upper lip was the one which was cut or affected," though it might be necessary to give also in accurate medical phraseology, the technical name of that muscle in order that it could be definitely described to later witnesses. This may be done in such a manner that the jury will understand the rea-

son; will understand that these names are used to insure accuracy, not to display a great amount of learning.

Where questions of opinion figure, the lawyer must see that his witness has a tangible reason on which he bases his opinion. A railroad company for instance takes the client's real estate; he is entitled to recover its value and a witness is called to testify to its value. The witness's valuation has weight simply in accordance with his ability to give a convincing reason on which it is founded. If other real estate similarly situated and in the same locality for instance has recently found a ready market at a certain figure, that would be a good reason to infer that the real estate in question is worth the same amount of money.

The practice in this respect differs in different jurisdictions. In some when a witness is offered he is confined to stating the value. The opponent then cross-examines him and the witness should be able to sustain himself on cross-examination and to give reasons to confirm the estimate of value which he gave. The lawyer who produces the witness is not allowed to ask him why he finds that value. In other jurisdictions the lawyer is allowed to ask him what in his opinion the value is and also allowed to ask him why he reaches that opinion. It will be

readily seen that if it is permitted to ask him why he reaches that opinion it should be done, because if he gives simply his judgment of the value and the opponent does not cross-examine him and if the opponent then comes on with his witnesses who give their opinions of the value and give also strong, sound reasons for their belief, the opponent has the advantage. His witnesses will weigh more with the jury. So where it is allowable for a witness to give not only his opinion but also the reason for it he should be called upon to do so.

Concerning medical witnesses the same thing may be said. They give their opinions and they should be asked to give reasons for the faith that is within them based upon experience, their observation of similar cases and in some States upon their learning from the books of their profession, although in other States they are not allowed to give their learning from the books at all and are allowed to give only their own experience; the results that they as physicians have obtained or noted, irrespective of what the writers of books have said in regard to the matter.

Again in regard to the testimony of experts on handwriting the practice differs. Whether a note is genuine or a forgery, whether a will is genuine or a forgery, whether contracts are

genuine or forged, whether writings were made by the party charged or, if the signature is his whether there have been some changes in the text over the signature—all these things are frequently the subject of expert testimony and various methods are adopted. For example in a contest in regard to the validity of a signature to a note a comparison may be allowed between that and other signatures of the same party; but in some jurisdictions the other signatures have to be first admitted to be genuine because if the other signatures are themselves disputed there will have to be another trial on them, and if they are again disputed and someone else has some other signature to be compared, another comparison has to be made. So a chain of links would be formed each one dependent on the other. The theories differ in regard to what extent and under what circumstances the disputed signatures can be aided by comparing with other signatures made or claimed to have been made by the person charged with having written the signature in dispute.

CHAPTER XII.

THE CROSS-EXAMINATION.

THE cross-examination of witnesses is perhaps the most difficult part of a lawyer's duty—so difficult that it is doubtful whether any rules can be given telling what to do or what not to do with reference to it. There are however some things upon which lawyers agree and a few of them may be suggested.

The first observation often made about cross-examination is much like Punch's famous advice to one contemplating matrimony—don't. That is one way of solving the difficulty and where there is no other it is a good way; at all events it is better than making a misguided attempt that ends disastrously. To experiment with the subject is very much like playing with fire-arms. It is better not to touch them unless they are thoroughly understood because they are very apt to injure the one who holds them quite as much as anyone else. Still by the same token that the poor cross-examiner does a great deal of mischief at times, a good cross-examiner may do a wonderful amount of good to his side of the

case. Hence it is well to know something about the subject.

One of the first admonitions to give is that when a cross-examiner happens to bring in something that helps him he should stop right there. He should not try to improve his disclosures but should file it away for future reference in the final argument and pass along to something else. Any practitioner who has had court experience can tell dozens of incidents by way of illustration of the advisability of following this rule. A typical one occurred recently in a street car controversy. A woman claimed that the dispute started because the conductor gave her only three nickels in change out of her quarter instead of four; that led to an altercation and to her ejectment from the car and of course much hinged upon the fact whether the conductor was in the right or in the wrong. The examination proceeded like this; the car was crowded and it was a little dark; the woman did not claim that she really counted the nickels, what she said was, "I am sure there were only three because I heard them go in my hand click, click, click." Then the cross-examination continued, "Where did you get on?" "Where did you get off?" etc.; then she left the stand.

Now of course three clicks meant four nickels, the first nickel making no click. An inexper-

ienced young lawyer conducting the cross-examination would doubtless have said, "Ah!" "Three clicks, were there. Doesn't that make four nickels?" and she would probably have replied, "The first click was on my wedding ring." But the experienced examiner who dropped the matter right there saved up refutation of her testimony for the last speech.

This was a very small incident but it is a matter of observation that nearly every jury case sooner or later turns on some small incidents which though it may not convince the twelve jurors will cause one juror to hesitate. It may produce a small verdict instead of a large one or produce a hung jury. For the very reason that it is small it passes by the lawyer's attention but the jury are twelve men of quite ordinary intelligence who have no experience with the technicalities of the law and who deal with the commonplace everyday matters and a very small thing may affect them. So it is the small incidents that count and in the last speech they are often used effectively.

At times if a point is overlooked and then developed in the last speech the court will stop the speeches and allow a party to offer more evidence but this is a matter of grace and favor with the court. It is a very difficult position for a lawyer to be put in because frequently the

witnesses are gone beyond recall from the court room and the court will not stop the case long enough to allow them to be sent for and brought back. So the small incidents must be watched as the case proceeds, in every part.

If there are questions on the cross-examination care must be taken to see that they are put in the proper order. It may be important which question comes first and if they are reversed the point may be utterly lost. Suppose for instance that a man is attempting to prove that another man had insulted his wife, and the time when the alleged insult took place is important, the husband stating that it occurred on a New Year's day. The lawyer on the other side of the case has a letter which the husband wrote to his client on the following June first—a friendly letter. If the plaintiff had heard this story on New Year's day he probably would not subsequently write a friendly letter to the defendant, so as the matter is being examined and the plaintiff testifies that his wife has told him this story if the defendant's lawyer should ask "How does it happen, sir, that you wrote this friendly letter on the first of June?" he would probably answer, "My wife did not tell me about it until after that." It is incumbent upon the defendant's lawyer to show that the wife told it to him before that if she told it at all,

because if she did tell it before that, it did not amount to much otherwise he would not afterwards have written a friendly letter. If the complainant is dishonest he will try to make the date as late as possible. So the defendant's lawyer should proceed in this way, "Your wife told you this thing?" "Yes, sir." "Well now it didn't amount to very much because she didn't tell it to you for some time after it happened?" "O yes, it amounted to a great deal because she told it to me immediately." This commits him. It is unlikely that he should have heard his wife's tale on the first of January and should have written the defendant a friendly letter after that date, so his story is shown to be inconsistent and incredible. In this way the sequences must be carefully watched. The illustration gives a wide range of several months but it may be a matter of only days or hours.

The truth must often be elicited by indirection, supposing that the purpose of the examination is to break down a liar. If the other side is telling the truth and things happened just as they have stated the chances are that they are in the right and it is altogether likely that they will win the suit and that they should win it. It is not the duty of a lawyer to maintain a suit or defense for his client who is in the wrong. It is his place simply to do his full duty to his cli-

ent, and everything that has been said heretofore is merely to aid in finding out whether the other side has the right of the case or not, which cannot be ascertained until these various tests that are being explained have been tried.

Suppose a witness states among other things that B. and C. were present on a certain occasion and it is important to the other side to have him admit that W. also was present. If he is asked point blank "Was W. there?" he will say no. The cross examiner is satisfied that W. was present and that the witness knows it but the truth must be elicited from him indirectly. So he is carried along with the details of what he has said, that B. was there, that C. was there, and so forth and he is then asked, "It was quite stormy, was it not?" "Why yes, it was chilly." "A blizzardy day, as you were standing out there at the corner at the end of the field?" "Yes, sir." "And B. was quite wrapped up in a large coat?" "Yes." "And W. He had his heavy coat on?" or "Was it W. that said, 'I wish I had my coat; I didn't think it was so cold?'" "No, W. didn't say that; it was C. said that; W. had his coat." In some such way he can probably be cornered into an admission that W. was present, whereas if he had been asked directly "Was W. there?" he would have answered "No," because on direct reflection he would rec-

ognize well enough the importance of throwing W. out.

A question should not be asked on cross-examination unless it has been balanced carefully but quickly. A cross-examiner's mind, like lightning, must cover a great deal of territory in a flash and he must be able to foresee instantly, first, what the answer is likely to be; second, if the answer is such as is wanted will it do him any good; third, if the answer is not what is wanted will it do him harm; and fourth, what are the probabilities and had he better keep quiet. Sometimes the answer is bound to injure the examiner whether it is yes or no, as in the following case where it had been better if he had refrained from asking the question at all. A woman was suing a railroad company for injuries and there was the usual claim that she was greatly disabled at the date of the trial as a result of the accident into which the defendant company had cast her. The defendant company claimed that the woman was not affected by the accident at all but that she had been a sufferer for years from various ailments and that her condition on the day of the trial was the result of those ailments and was not caused by the accident in question. She had been attended by her family physician, who could not come to court on the day of the trial because he

was ill, so it was arranged to go to his house and take his deposition for the defence. He was asked whether he had treated this woman prior to the accident and for what and he made some answers in his deposition. The question mistakenly asked on cross-examination was this. "Doctor, this deposition is being taken at your house while you are sick?" "Yes." "Doctor, is your memory now as good as it was while you were well?" a question to which the answer either way would hurt the plaintiff. If the doctor said "Yes, my memory is as good as it was," it would strengthen him as a witness because a witness with a good memory is always entitled to respect. But if the doctor said "No, it is not so good," the argument of the defendant's counsel would be that the witness remembers so much as he has given, but that if he were well he would probably remember more. So either way the answer yes or no was bound to be injurious to the plaintiff. The way he actually answered was. "If I were well I think I could recall still further treatments I gave to this woman in former years." But this illustrates a case where the question should not have been put at all.

Generally speaking it is much easier to tear down and criticize than it is to build up, so it is much easier to criticize another man's cross-ex-

amination than it is to conduct one. In the general plan of cross-examination however there should be some sort of a basis. Then in following this general logical plan more liberties can be taken if one has the last speech than if the opponent has the last speech. More experiments can be tried because minor injurious matters can be smoothed away or explained away in the last speech, whereas this would not be possible if the opponent had a speech following.

A witness on cross-examination may be taken through his testimony again from beginning to end, step by step, which generally is a bad plan if his story is true because he makes it more emphatic with the advantage of telling it twice, but it may be a good plan if his story is false, especially if it is a long and elaborate story, because his second version may be quite different from the first one. There may be some incident that occurs in his story which did not occur in actuality—because the whole thing is a fabrication—which he may imagine on the second occasion somewhat differently. It is an old saying that a liar must have a good memory. If a thing actually happened a man may tell it a hundred times in the same way, getting it every time correctly because he has the mental picture of it and that picture is always the same. But if he never had the experience he may be caught on

some incidental feature which shows that he is either fabricating or that he is ready to fabricate, and either case weakens him with the jury.

A witness asked questions by his own lawyer will answer every question promptly. But put through the cross-examination and asked precisely the same questions, which are however mixed in with other things which he has not considered he will not answer promptly if he is telling a lie or if part of his testimony is false. He will not answer the question to the cross-examiner as promptly as he did the same question to the lawyer on his side of the case unless he is an absolutely truthful man who does not care for consequences. If he is inclined to lie and wants to help himself or his friend to win the case he stops and considers what to answer to a question in order to produce the best results in the case. The moment he does that he reveals himself as dishonest. Even though the answer turns out to be true the mere fact that he is waiting, hesitating to give it and that he finally gives it, not as a fact but as the result of a deduction on his part shows that he is not telling the absolute truth, that he is there to swear for the party that calls him and that he so understands it. So when he stops and waits on a very simple question which is apparent to the jury the skillful cross-examiner will say, "Why don't you answer?" "What

are you waiting for?" "Why do you hesitate?" and in three or four phrases which will get into the record indicate to the reviewing court this witness's manner of testifying. He will indicate that this man who answered readily on his own side could not answer readily on the opponent's side, thus showing that he was groping for an answer which might seem advantageous.

The primary importance in having some general plan, some object in the cross-examination cannot be too strongly emphasized. To simply call the witness again and remark, "Remember you are under oath," and "What do you say?" and have him repeat with emphasis what he has already told obviously does more harm than good because it merely intensifies his previous story.

If the theory of the case or defense is in a certain direction it is a mistake to cross-examine in another direction. It would be very absurd, if an alibi is relied upon for defense, to cross-examine the witnesses of the prosecution upon some other theory of defense. If the witnesses for instance have testified that the assailant struck the prosecuting witness with a club it would be senseless for the defense to say, "Now did you not see the prosecuting witness reach to his pocket as though to draw a gun, and did you not at that instant and not sooner see the other man strike him with a club?" when his

real defense is that his client was not there at all but was a thousand miles away. It would not make any difference under these circumstances whether the man who was there, was first threatened or not. Under circumstances like these the prosecuting attorney, in his last speech, would be justified in saying that the defense of an alibi was all fabrication, something to which the defendant had been driven by the desperation of the case after his attempt to prove self-defense had failed. He will argue that this is plainly to be seen from the cross-examination of the State's witnesses when they were asked so carefully if it were not true that the man who swung the club was first threatened by a revolver and he will go on to assert that the defense, being unable to establish that point, "Now like a drowning man grasping at a straw tries to prove that this man was not here in town but was in Cincinnati when this thing occurred," which makes the whole defense perilously weak. So the necessity of having some sort of a plan on which to work cannot be emphasized too strongly.

The previously given precept may be repeated that it is well to keep back statements of the defense until the direct examination is all in, because if the early statement of defense is for instance the theory of insanity it may be a check

afterwards to taking advantage of a very strong case of self-defense, which may exist, or if it be self-defense it may be a hindrance to taking advantage of a strong plea of insanity; or if it is an alibi it may prevent making use of some other line. A strong defense must not be weakened or confused with an attempted development of something else. When, as sometimes happens, two defenses exist, insanity and self-defense, for instance, the wiser course is to take the stronger of these rather than to work them both when there is danger that each one may weaken the other.

Of course it is not always possible for a lawyer to adhere unvaryingly to his pre-arranged plan. At times he must change his base as the case requires, just as many a good general who has started a campaign on a certain plan is required by the exigencies of the case to change it and adopt an entirely different one, but so far as possible he must have in mind some general method of procedure. In the celebrated Maybrick case for instance in which the accused was convicted of having poisoned her husband by giving him arsenic, her attorney's claim was that the husband had died of arsenic but that he himself had been an habitual user of the drug and had taken too much. When the prosecution put in its evidence in such a case the line of cross-ex-

amination of the defense would be to encourage the witnesses for the prosecution as much as possible to prove the presence of arsenic, because the more arsenic they proved the more it would help to indicate an habitual and excessive use of the poison. Whereas if the defense had ultimately expected to rely upon the fact that the deceased did not die of arsenic at all but that his death had been caused by natural causes the line of cross-examination should have been towards getting witnesses to diminish the testimony as to the presence of an abundance of arsenic.

Again in a case of forgery if the line of cross-examination were on the theory that the accused had authority to write the paper it should indicate a line of defense of that kind; and if the defense should later swing about and insist that the accused did not write the paper at all the two positions would be so manifestly inconsistent as to give to the prosecution a very strong argument that the defense was trying to lie either on one end of the investigations or on the other.

So in injury cases the questions to be developed are; Was the defendant company negligent in the character of the machinery? Was the plaintiff careful in his use of it? Was the machinery defective long enough for the plaintiff to know that it was defective? To some extent these are inconsistent positions and a blind ques-

tioning and cross-examining of the witnesses without any fixed plan of action is very apt to produce disastrous results and weaken the side that undertakes so aimless a task.

If it be clearly seen that the line of cross-examination for the defense indicates the idea that the plaintiff had assumed the risk this is practically an admission by the defense that the defect existed. If then the defense afterwards attempts to assert that the defect did not exist at all the argument would be that that is a subsequent expedient because it was shown during the trial that the defense knew the defect had existed, knew it to such an extent that they tried to prove that the plaintiff had assumed the risk of the defect.

Unless a lawyer is on his guard he can be persuaded into such inconsistent positions. In a recent murder case, the body of the victim had been discovered devoid of clothing in a sort of cesspool or cistern with a heavy lid or cover over the top. The attorneys for the defense put many questions in regard to the condition of the liver of the deceased as indicative that death might have been caused from a disordered liver. The prosecuting attorney allowed undue prominence to that point by resuming the re-direct examination of the physicians and calling other physicians to testify to the condition of the liver

thereby almost giving the impression that the test of the question of guilt or innocence depended upon the condition of the liver; which was plainly misleading and inconsequential. The prosecutor should not have re-examined his own physicians or cross-examined the defendant's physicians; he should have waited for the final argument, in which the prosecution has the advantage with the last speech and then he should have ignored the question of the disordered liver. He should have concentrated himself upon the question of the identity of the murderer, taking it for granted that murder had been committed and that the only question was by whom and in his last speech he should simply have said in one or two sentences, "Well now, about this liver, gentlemen. I assume that one or two of you may have been influenced to believe that the deceased, lingering with a disordered liver finally died and being dead took off his clothes, walked two or three miles, threw himself into the cesspool and covered himself over with the lid. Now some of you may believe that but I don't think so," which would have been more effective than two or three days' cross-examination in regard to the liver.

So at times the art of the cross-examiner is to intensify the very things that have been brought out and then by a quick turn to use them to his

own advantage where he can see that that is the only thing to do. There was an illustration of this in a case that happened a few years ago. The creditors had sold merchandise to a tradesman who may be called the debtor and the creditors found that the debtor had transferred his whole stock in trade to his wife, a very prepossessing woman. The creditors attached the merchandise, claiming that it still belonged to the debtor and that the transfer from the debtor to the debtor's wife was a fraud. The wife of course replevied and thus the case was tried, the wife claiming the goods on a replevin. It was an extremely dangerous case because the wife was the plaintiff and her lawyer had the last speech. The creditor's lawyer in order to prove that the transaction was a fraud from beginning to end produced a witness who testified that he, the witness, had aided the debtor in secreting the goods at midnight and this witness developed the method of the entire plan whereby the fraud was conceived and executed. Naturally this witness in turn was contradicted by the debtor. Not only that but the debtor's attorneys brought a dozen reputable citizens of the highest standing to impeach the character of this principal witness. Now the creditor's lawyer exerted himself to exasperate those witnesses in order to make them testify as forcibly as they could

against this witness, his own witness, because he knew that his witness was necessarily damaged in reputation anyway by their testimony. On cross-examination he led them on to paint the witness's character in the worst possible light and the observers thought the creditor's lawyer was making a mistake. But this was not the case, as the sequel showed. When the arguments came on, the wife's lawyer of course said that she had bought the goods; then the creditor's lawyer spoke, knowing that the wife's lawyer would speak last and knowing also that in his last speech he would demolish this witness; so the creditor's lawyer contented himself with the following little speech, the facts and circumstances of which could not be contradicted, "And it is all explained to you, gentlemen of the jury, by the testimony of my witness (naming him, this principal witness), but now you have heard twelve of your esteemed fellow citizens affirm that they would not believe this witness under oath. I tell you frankly, gentlemen, I would not either and I trust you won't believe him under oath unless you find him corroborated by pretty strong circumstances." And then he repeated some of the circumstances, "And further, gentlemen of the jury, you have heard these twelve citizens say that this witness (naming him again) has been guilty of many misdemeanors

and that he is a man of bad reputation. Now, gentlemen, I haven't any doubt that he is a man of bad character and he is just the kind of a man that this party here (naming the debtor) would ask to aid him in perpetrating this fraud. Isn't he?" The jury thought so too as there was nothing left for the opposing lawyer to talk about. He could not overcome the effect because he himself and his own witnesses had done their utmost to blacken the witness. In that case it would have been a colossal mistake for the creditor's attorney to have tried to impeach the testimony of those reputable witnesses or to bolster up his own witness as though he were being wronged, because the odds were too greatly against him. The only possible plan was to turn the adversary's own weapon against him.

So the issues in the case must be clearly within grasp and the prospects of the success of the general plan. In a case which recently passed through the courts, a woman who had been injured brought suit for damages and won a large verdict which was later reversed on a technical error and then the woman died. Her administrator was substituted in her place. The case came on for trial and the plaintiff and his attorneys and his physician of course saw it to their interest to aggravate the condition of the woman as much as possible to show how much

she had suffered and how terribly injured she had been. The defendant's attorney quietly encouraged them to do so until they proved to the satisfaction of themselves and of the jury that the injury to the woman had resulted in her death. The judge for a moment thought that the defendant's attorney was making a mistake, the usual mistake of cross-examiners. But having convinced everybody that the accident had caused the death of the woman the defendant's attorney then asked that the jury be excluded that he might say a few words confidentially to the court. The jury went out and the defendant's attorney reminded the judge that the Appellate Court had very recently decided—so recently that it had not yet been published—that inasmuch as the woman died of the injury an entirely new cause of action was created known as a cause under Lord Campbell's act, as it is generally termed, namely the act of the legislature which allows a recovery where death ensues, where at common law there is no such right of action. The courts have held that that action displaces the first action or in technical terms causes the first action to abate. When the court was persuaded of that he recalled the jury and ordered in the existing action a verdict of not guilty and judgment on the verdict. The attorney for the plaintiff, who then for the first

time had looked into the thing, found that he had to commence a new suit based upon the death and unfortunately found that he was just four days too late. The truth in this case happened to be that the woman's injury did not result in her death at all, but these parties being encouraged to overdraw the matter, though they perhaps did not directly lie about it, simply stretched themselves most effectively out of court.

The same things which it is advisable to ascertain with reference to the jurors to see whether they are fit as jurors, it is also advisable to find out with reference to the witnesses; to see whether there is anything which might tend to influence the witnesses either to exaggerate their testimony or to imagine things or to lie deliberately; whether for instance they are relatives, whether they belong to the same society or are in the same line of business and so on. If a witness is on the stand, whose testimony is strongly unfavorable, and the importance of impairing it to some extent is felt, something of that kind may be elicited from him which will at least give an argument. Some facts may be found in regard to him from which, in accordance with the general motives of humanity, it may be argued that he was tempted to swear falsely or mistakenly

or that his prejudice induced him to say things perhaps not purposely false, but biased.

Some witnesses of course will adhere to the strict truth even though they feel a friendship for or an interest in the parties; but many things in the testimony are not of the mathematical kind and they rest more on estimations; the wish is father to the thought and if the witness wishes a certain result he commences to think in that direction, especially in all matters relative to opinions. If the witness feels interested in getting a large amount of money for his property he will swear—and swear conscientiously—to a high value for that property and will believe he is telling the truth when he is saying it.

Actuating motives of friendship or hatred can usually be easily disclosed in the witnesses. Human nature is such that, generally in a sensational matter such as a very acrimonious family fight concerning inheritance or the breaking of a will, bitterness of feeling is always manifest. People will take sides, and especially in small places, the controversy becomes a very bitter matter which may even find its way into politics. The feuds in Kentucky and Tennessee where families have been fighting each other for generations, lying in wait to kill, are well known. Naturally if there is any feeling of that sort in a court room the witnesses will manifest it, par-

ticularly the women who are usually more expressive of emotion. An emotional woman witness asked on cross-examination, "Didn't you, when you spoke to Mr. McLaren, etc.—" naming the leader of the other side—will probably assume an expression of hatred and scorn as much as to say, "I wouldn't speak to that man in my life." If such a witness's account is flatly contradicted by another witness who in demeanor is placid, betraying no feeling either when speaking for the plaintiff or for the defendant the jury can see that the latter witness is, probably, as he says, entirely disinterested; whereas the first witness although she claims to be entirely disinterested is betrayed by her expression. If it comes to a question of veracity between the two witnesses the jury will probably believe the one who appears disinterested.

So if any circumstance is found which might naturally be expected to influence the witness, of course it should be brought out but care must be taken to see that the point is well made. A client will sometimes give erroneous information to his lawyer; he will say for instance, "Why of course the fellow is lying. He married the plaintiff's sister. Of course he will lie about it." Then when the witness is asked, "You married the plaintiff's sister, didn't you?" and he answers "No, I didn't," his story has

been simply intensified, because to attempt to break down a witness is an admission that his testimony was important.

Great care should be taken not to inadvertently piece out an otherwise defective examination. If the witness, for instance, has not covered a certain point he should not be given an opportunity to do so nor should his attorney be made to realize the fact of his omission and thus be prompted to take the witness and cover it. Here is an illustration. It is charged that a railroad engine ran over the plaintiff; that the engineer did not ring the bell as required by the ordinance; that the company did not have a flagman at the street crossing to wave the flag as required by another ordinance. The railway company produces a witness who stood near the spot and who for the defense gives testimony that the bell was ringing and with that is dismissed. He has shown himself to have been at the place the same as the plaintiff's witnesses were; perhaps he was standing conversing with one of the plaintiff's witnesses. The plaintiff's witnesses testified that the bell was not rung and the flagman was not there. The defendant's witness testified only that the bell was rung. Now he has given the strongest possible evidence for the plaintiff because in the argument to the jury that the plaintiff's witness was telling the truth when

he said the flagman was not there the attorney will say, "Gentlemen of the Jury, if the flagman had been there why did not the defendant's own witness, whom they themselves called and thereby held out to be a truthful party—why did he not say the flagman was there?" The mere absence of testimony on the part of the defendant's witness on that point is strong corroboration of the plaintiff's witnesses who say the flagman was not there. And it is enough for the plaintiff to win on one count of the declaration. He does not have to win on every count.

Some cross-examiners under the circumstances above would make the mistake of taking the railroad's witness and questioning him until they got him to say the flagman was there; or if he was a little too conscientious to directly lie about it he would say that he thought the flagman was there or that the flagman might have been there or that he stood with his back to the tracks the whole time and could not say whether the flagman was there or not. So the effective argument that the plaintiff might use from the mere silence of the man would be lost if the plaintiff himself cross-examined him into a statement, which to some extent at least overcame that silence.

In general terms the object of the cross-examination should be to ascertain whether the

account which the witness gave is a reasonable account, whether it fits in with the facts and circumstances which have either been given by credible witnesses or have been admitted to exist in the case beyond dispute; to learn whether the witnesses corroborate each other or contradict each other; to learn whether or not the witness is telling a deliberate lie. If there is strong suspicion that he is a deliberate liar some entirely different method must be used from the one to be employed if he is believed to be perfectly conscientious but mistaken. Only experience and intuition can be guides in this regard and even they are frequently at fault. Some of the smoothest liars in the world will put up the best appearance and some of the most honest witnesses will be so embarrassed and shambling in the witness chair that almost anyone would believe them to be lying. About the only reliable general rule for detecting falsehood is the one that has been brought out before. If the witness is telling a drilled story he will be apt to be glib in reciting the story but will be much inclined to hesitate in giving anything else not in the direct part of his drilled story. The moment he is asked something not connected with his memorized story he is at a loss, whereas if the occurrence actually happened as he stated he would have seen all the surroundings and could

tell them as well as the main incidents. Witnesses at a loss will resort to the constant repetition of, "I don't know," and "I don't remember," whereas if their main story were true they must know those surroundings and must remember them.

Many things, as has been stated before, must be discovered by indirection, especially if the witness is shrewd in following the lawyer's moves and if he is inclined either to pervert or to allow his opinions to be strained on his side of the case. Suppose that in a damage suit the defendant is attempting to prove that the plaintiff assumed the risk; that he had such familiarity with the defective engine in question as to well understand its peculiar dangers, and that thus knowing and understanding he nevertheless remained in the employment for weeks, perhaps months. If the plaintiff is asked directly such questions as "Didn't you know that this was defective?" "Weren't you told about it weeks before?" he will immediately say, "No, I didn't know anything about it." That may be the only chance the defendant has to prove the fact on which the law predicates the assumption of risk because the defendant may have no other witness. So in order to make that proof, when the witness is commencing to give evidence that the engine is defective, the defendant should draw

him out in an indirect manner, indicating that the defendant did not believe that the plaintiff knew that the machine was defective. He should proceed something like this: "Now, you think this wheel was too small in diameter. That cannot be, because all these engines have, as I understand it, exactly the same kind of wheel, have they not?" and the witness will answer, "O no, sir, others don't have it." In this way the witness instantly indicates a wide familiarity with machines in general, by comparing this engine with other engines that have come to his experience and observation, which is one of the elements of the assumption of risk. As a matter of law it is much easier to prove the fact that the man who has had experience with machinery in general did assume the risk of a certain engine, than to prove it concerning a man who never saw another engine in his life. Great care must be exercised that the cross-examination does not open the door for damaging evidence which would not be allowed on direct examination. Sometimes in the re-direct examination a whole flood of matter is thrown before the jury. There was an illustration of this in one of the Luetgert trials. The cross-examiner asked a police captain a question indicating that he thought the police captain had been attempting to fix or tamper with the jury, and hinging upon that

was revealed the whole story of how the captain went to New York and among other things how he made an examination there to prove that Mrs. Luetgert was not there. Part of the defense had been that Mrs. Luetgert had not been killed at all but had gone away, either because she was insane or because she had some hatred for her husband and was holding herself in hiding in New York in the hope that her husband would be hanged. But the entire research of the police in New York came out in the redirect examination, provoked by the cross-examination, whereas there might have been some doubt in the case and the jury might possibly have thought the woman was in New York, if something that the state could not have introduced at all as direct original evidence had not been brought out in the redirect examination.

The jurors will sometimes entertain a doubt from the defense and from things brought to the jury's attention that the state cannot really contradict because they are not in the case. That possibly is a defect in our jurisprudence. For instance the attorney for the defendant is allowed to say things to the jury, which should not be said because they are not law, but which have their effect on the jury. If the jury then returns a verdict of not guilty, that ends the prosecution, because the State is not allowed a

new trial, but if the accused is found guilty he may move for and obtain a new trial if the State's Attorney has said improper things to the jury.

So it may well be imagined that the defendant's attorney may have said in that case that Mrs. Luetgert was hiding in New York just for a trick upon her husband; some of the jurors may even have believed it although no evidence was offered to prove it and it might have left an impression, but the little impression it might have made was swept away by the statement of the police captain who said that she was not in New York, because he was down there himself and had investigated. That testimony, based on hearsay he would not have been allowed to give unless the door had been opened during the cross-examination.

The Luetgert case furnished also another instance of the way in which cross-examiners frequently spoil a point by trying to over develop it. The cross-examiner in that case had obtained some apparent contradiction from the medical expert in regard to an *internal* sesamoid bone. He was not satisfied with that but persisted until he had shown that the doctor had called that same bone *external* sesamoid. Then instead of stopping there he insisted upon questioning further "Now doctor this bone exhibit

A is an internal sesamoid?" "Yes," "Now doctor, don't you remember that four days ago you called it the external sesamoid?" "Well yes, I did." And then the doctor gave a plausible explanation for the apparent inconsistency. The skillful thing on the part of the cross-examiner would have been not to say a word about the contradiction until the argument when he could say, "Gentlemen of the Jury, you remember in the session of the 18th of May the doctor called this exhibit A the *internal* sesamoid; now I have here the reporter's minutes—you will correct me if I am wrong because I paid particular attention to it—where on the 12th of May he called the same bone the *external* sesamoid. Now what do you think of a doctor like that?" This would weaken the doctor's entire testimony because he could not then get up and explain himself.

As a matter of fact there is sometimes a difference in technical nomenclature and apparent inconsistencies can be explained if the witness is given a chance but the shrewd examiner will not give him a chance. It may be considered contemptible to resort to tactics of this sort but unfortunately it is part of a lawyer's calling and frequently as in many other things his methods are judged by his results. If he wins a case he is a great lawyer; if he uses the same trick and

loses the case he is a pettifogger caught in the act. There is nothing that succeeds like success. There is small doubt that Rufus Choate in cross-examining a man who a week before had said, "external sesamoid," and to-day said "internal sesamoid," would have stopped there and used this against him on the final argument.

A friendly witness must not be driven too far. If on the cross-examination it appears that the opponent's witness is inclined to be friendly this must not be over-emphasized for fear the jury will get the impression that he is a spy. If the jury gets an idea that a witness called by one side is overly friendly to the other side they may think that he has been bribed and though he may be a truthful and conscientious man, if driven too far his testimony will have the opposite of the desired effect.

Care must be used in wording a question because hostile witnesses are shifty, they are evasive, they are watchful. For instance in a certain case an attempt was being made to prove that the defendant had made threats against the prosecutor. The witness was friendly to the defendant and the State's Attorney had been informed that the defendant had said in the presence of his friend that he would attack the prosecuting witness, and the examination proceeded something like this: "Mr. Witness, you know

this defendant?" "Yes." "Did you ever have any conversation with him in which he said that he would slug this man the first chance he got?" "No." That was all that was said and the witness told the absolute truth but the weakness was this: the witness *had* heard that threat made, but not in the course of a *conversation.* Both must participate to make it a conversation. The witness had answered truthfully and could not be convicted of perjury because he had said no to that particular question, but if the prosecutor had understood his business he would not have narrowed his question. As a generally applicable rule it is well not to act on narrow principles. If a witness is asked the question, "Did you in a conversation in the Holland Hotel about three o'clock in the afternoon, hear the defendant say thus and so?" the witness may say no, because he heard this said about eleven o'clock and not about three o'clock. The way to ask such a question is, "Did you at any time or place hear this accused speak in any manner with reference to this prosecuting witness?" and then after locating the act of speaking, ask for the details thereof. It would take a very clever liar to evade that. Of course he may commit perjury but he cannot evade safely. So the question must be carefully worded in order that it may be comprehensive.

Cross-examination, it has been stated before, admits of no fixed rules. In the long run the practitioner must learn for himself by constant and close attention ripened by experience. From an article by one of the greatest prosecutors in New York City, a man who has handled thousands of cases and who has given some valuable matter in print on this subject, an illustration may be taken to show how one lawyer's method may seem open to criticism by another practitioner.

The accused had put up a false defense and an attempt was being made to break it down.

"In the Kennedy murder case in which Kennedy shot and killed 'Big John' Keating the issue hung upon threats to kill Kennedy which it was averred had been publicly made by Keating. A friend of Kennedy's testified that while sitting in a barber shop he had heard Keating say that he would kill Kennedy on sight and had seen him show a revolver." Here were the two conditions, memory and action. The prosecutor asked this witness, "Were you a friend of Kennedy's?" "Yes." "Did you tell him about this threat?" "No." Then the prosecutor said, "Do you mean to say that hearing such a threat against a dear friend of yours, seeing him afterwards you said nothing whatever about it?" The witness was in such a false position that

finally, being hopelessly entangled, he asserted, "I did tell him." To compel the witness to contradict himself in that way was very clever but in the writer's opinion that last question should not have been asked. When the witness said that he heard the threat against his friend Kennedy and when he said that he did not tell Kennedy about it the prosecutor should have stopped there and used these conflicting statements in the final argument. As it was he gave the witness an opportunity to explain and it was only his good fortune that the witness was not wise enough or slippery enough to avail himself of the chance. The prosecutor succeeded in this instance, but he did not rest there; he went still further. According to the account: "This destroyed this prepared lie but the prosecutor, on the track of the truth, carried him further and showed that at the time he told Kennedy, according to his evidence, Kennedy instead of being at the place sworn to was actually locked up in the Tombs."

The prosecutor, then, had still more good luck in a very dangerous and needless experiment because if this witness was telling a lie and wanted to go on with it, it would have been easy for him to invent a plausible explanation of his apparently inconsistent statements. He met the man frequently at various times and places and

although he happened to stumble on a date when the man was in prison it was not an irretrievable blunder, because witnesses are very often confused by minor matters as to the exact date when or place where a thing happened. So the last questions though they happened to result fortunately were a dangerous experiment and a needless one because they gave the witness an opportunity to explain away the inconsistencies and it was merely a fortunate chance that he was too stupid to avail himself of the opportunity.

An incident occurred in a recent case to show the unfavorable results that sometimes attend upon questioning a witness too far. The witness, according to his account, had tramped through the night, come to a switch station and was sitting there warming himself at the time of an accident. He was brought in by the railroad company to prove that a certain signal was displayed which the plaintiff claimed was not being displayed at that time and place. The witness made a very poor impression and the plaintiff's attorney should have allowed him to be taken at his face value because the jury had an idea that he was a tramp and probably thought that he had been bought for a few dollars to come in and tell a lie. But the plaintiff's attorney, not satisfied with that, harassed him

with questions until the fellow rallied himself and told a story which appealed to the sympathies of the jury.

The story he told was that he had come from a distant point to go out to a farm expecting a job out there; that when he arrived at the place he found somebody had reached there two hours before and gotten the job and that he had no money left except a few cents which he did not want to pay out in railroad fare because he did not want to commence begging as soon as he reached the city. The jury got the impression that he was a pretty good sort of fellow and believed his testimony. That was another case where the questions went a step too far.

After the witnesses have all testified it is sometimes necessary to impeach them, to attempt to break down their testimony, showing that they are not to be believed under oath, disclosing perhaps that they have been convicted of crime somewhere, or something else that reveals their bad characters. But this also is a dangerous experiment which must not be tried until it has been calculated just what the result is apt to be. The question of sympathy is always a great factor. A witness may have made a poor impression upon the jury, but if sympathy is aroused for him, even though it be a false sympathy the jury may turn to his support.

There is nothing gained in attacking a witness for the mere satisfaction of attacking him, though a client usually urges his lawyer to do that, and it may do more harm than good. As a general rule if the testimony of a witness is not all-important or, though it is important, if it can be safely overcome with other testimony stronger than his, with writings, matters of public record, etc., it is not advisable to impeach a witness's character or veracity. It may give false sympathy to him; he may be a very decent fellow. And it is especially dangerous if the witness happens to be a woman. The jury may think the whole fight is to determine the character of a particular witness and if there is sumpathy for the witness they will decide for his side. For instance to prove that a highly respected and well known witness, when he was fifteen years old committed some offense and served a short term in prison will often cause the jury only to sympathize with him. Even though he was indiscreet in the freshness of youth and committed some offense, or though he was guilty of a recent offense but one which had some mitigating circumstances, the jury will trust him. Of course if the witness is shown to have been an habitual thief the jury will not protect him because this indicates a dishonest disposition, but if it is revealed that under some

great excitement or provocation a witness committed an act of violence, the jury may still give full credit to that witness and to his testimony.

An illustration of the danger of arousing sympathy was shown in a recent case. A nine year old child had been killed by a street-car. He had stumbled off the platform and the car had run over him. The administrator, the plaintiff, had only one witness who was a colored boy about sixteen or seventeen years old, a playmate of the deceased child who also had been on the platform. The case came on for trial and this little black boy was brought out of the jail to give the facts for the plaintiff. The railroad company had the advantage, as they always have, because when the accident happened they went through the cars and took the names of the passengers. So the railroad company came with at least ten witnesses each one giving his or her version of the matter. They probably had enough evidence to win but they were not satisfied; they impeached the character of the colored boy and asked him where he came from to attend the trial and he answered that he came from the county jail. They asked him what he was doing there and he said that he had been sent there by one of the justices, naming the justice. Things looked pretty bad for the plaintiff but the plaintiff's attorney asked the boy just two or

three questions. He said, "How did it come that you were sent to jail?" "Well," he said "I took an old overcoat. It was an awfully cold day and I thought the man didn't care for it." That was one question. "Who prosecuted you when you went to jail?" "That man there," said the witness, pointing to the railroad company's lawyer. The jury gave the highest verdict that had ever been given in that county for the death of a child. There is not the slightest doubt that they would have given a moderate verdict—possibly none—if it had not seemed to the jury that the witness was being unnecessarily assailed, and that the railroad company's lawyer had prosecuted him just to destroy his evidence before the jury on this trial.

Of course there are instances where it is a lawyer's duty to his client to demolish the opposing witness's testimony, to show that he is telling lies. But he must be very sure of his ground, sure of his weapons and that they will not act as do boomerangs when thrown by the unskilled.

CHAPTER XIII.

THE INSTRUCTIONS.

SPECIAL FINDINGS AND SPECIAL VERDICTS.

IN regard to instructions the practice varies in different jurisdictions and in different court rooms in the same jurisdiction. In some places instructions must be offered before the case commences; in others they are offered after the case is closed. A lawyer must acquaint himself with the practice in his jurisdiction.

Under the title of instructions may be included holdings of law, special findings and special verdicts. In a case tried before the court without a jury the instructions are called propositions or holdings of law, which the lawyer must offer the judge for him to establish as being the law of the case or reject as not being the law of the case. These are very important because in the absence of a jury the judge himself is the jury and if he finds unfavorably the reviewing court will say that anything that he found is conclusive unless he made some mistake in the law of the case for he saw the witnesses and had a right

to believe them. The reviewing court is not justified in saying that he made some mistake in the law unless he has been asked to establish the law in these holdings or propositions and has refused, indicating that he had a wrong theory of the law in his mind.

In special findings and special verdicts the jury is asked to establish certain points in the case specially, not simply to say, "We find for the plaintiff," or "We find for the defendant," or "We find the defendant guilty," or "We find the defendant not guilty." There is a distinction between a special finding and a special verdict. The special finding will be considered first.

By special finding is meant that the jury is asked to establish a particular fact. In some jurisdictions they allow evidentiary facts to be specifically found; in other jurisdictions they allow only the ultimate facts and not the evidentiary or detailed facts which led up to the ultimate facts. In some it may be asked that the jury show, "Was the plaintiff himself at the time of the accident in question in the exercise of ordinary care on his part?" which the jury will answer by saying yes or no. But in the same court it probably could not be asked "Was the plaintiff when he approached the crossing of A. and B. streets lashing his horse and mak-

ing it go at a gallop?" because that is one of the subordinate or evidentiary facts which go ultimately to show that he was not in the exercise of ordinary care.

In Indiana, for example, the most detailed facts may be asked and the verdict might be read as follows: "We, the jury, find that on or about four o'clock on the morning of the 15th of April the plaintiff was driving northerly on the A-B highway and at that point when he was about seventy yards away from the railway track he commenced lashing his horses vigorously," etc.

If special findings are wanted it must be seen what the practice is in regard to getting them. In some places for instance the lawyer, before the argument commences, must serve upon his opponent a list of the special questions that he is going to have the jury answer and perhaps give a copy also to the judge; at all events he must give his opponent a copy. The reason for this is that the opponent has a right to know what the questions are, so that he also may argue to the jury what in his view the evidence indicates on them.

Whether or not it is advisable to put these special questions or under what circumstances it is advisable to put them is a subject for consideration. The question may first be viewed from

the standpoint of the defense. There are times when the defense ought to ask special findings and other times when the defense should not ask special findings. Suppose the common injury case in which a railroad company is sued for damages. The plaintiff was driving his wagon across the track on the public highway and the train struck and injured him. There are three counts in the declaration, first that the defendant company was running this train at the rate of 30 miles an hour whereas the ordinance at that time required that it run no faster than ten miles an hour; second, that they were running without a bell or whistle sounding, which were required by the law; and third, that they did not have a flagman there to warn people when driving towards the tracks. It may be seen at a glance that in this case the defendant ought to ask special findings. The evidence being all in, four of the jurors may think that the train was going thirty miles an hour; the other eight may think it was going only five miles an hour. Four other jurors may think the bell was not ringing and the whistle not sounding; the other eight may think the bell was ringing and the whistle was sounding. Again another four of the jurors may think the flagman was not there and the other eight think he was there. So if special findings have not been asked for, all twelve of

the jurors vote guilty though each one acts from an entirely different reason. If however the defendant's attorney has asked the jury to find specially on the three questions; as to the rate of speed of the train, whether the bell was ringing and whether the flagman was there, when these disagreements on the special questions come up either the verdict will be for the defendant or there will be a hung jury. So it would be a great mistake under these circumstances for the defendant not to ask special findings. Also the advantage that the plaintiff has in the last speech to the jury, especially if he is a powerful advocate and appeals to their emotions is somewhat diminished if the jury must stop to deliberate and analyze.

If the plaintiff, on the other hand, has a case which practically proves itself and the defense is double or treble,—if there are two or three propositions by way of defense,—the plaintiff should ask for special findings. For example one defense may be that the plaintiff settled the case and gave a release, and another defense may be that the defendant did not own the railroad train in question. These two rather divergent ones may be taken for the sake of simplicity. Six of the jury may believe that the plaintiff gave the release and if they so believe they must find for the defendant. The other six

may not believe that but they may believe that the defendant did not own the railroad, a question which was involved in the inquiry, so they must find the defendant not guilty. And so as before the first six may say not guilty because they believe there was a settlement, and the other six say not guilty because they believe there was no liability at all. If however the plaintiff had put special questions they would disagree and the plaintiff would get at least a hung jury if they failed to reconcile on one question or on the other. At least he would have a better chance than if there were no separate questions in which case they would all say "Not guilty," though six answered from one motive and the other six from a different motive.

Special findings is only another example of the old truth "Divide and conquer," commonly illustrated by the bundle of fagots, which tied tightly together cannot be broken, but one at a time can be readily snapped.

A special verdict is different from a special finding. It is applicable to civil cases as well as to criminal cases but it is more common in criminal cases. A special verdict is a verdict on each *count* of the declaration or indictment. For instance in a criminal case, a man is indicted for stealing a horse and the prosecutor, to make the matter safe, puts five counts in the in-

dictment, not knowing precisely which one will be fitted by the evidence. The defendant has a right to ask a verdict on each count separately: "We the jury as to the first count find the defendant not guilty." "We the jury as to the second count find the defendant guilty," or "Not guilty," and so on. He may possibly be guilty under all five of the counts because each one of them might fit the particular case. Of course he could receive only one punishment as it is the same thing although described in different ways; but they may find him guilty under the special counts.

In a civil case, the case of the railroad company, with three counts—that the train was running too fast, that there was no bell ringing, and that there was no flagman at the crossing, the defendant may be guilty under two counts. It may be true that the cars were going too fast, and that they had no bell. The defense may ask for a separate verdict on each count and then the verdict would be, "We the jury, on the first count of the declaration find the defendant guilty." "We the jury, on the second count of the declaration find the defendant guilty." It may be that they actually had a flagman there or that at least this statement was not disproved and so they would follow with, "We the jury, on the third count of the declaration find the de-

fendant not guilty." "And we assess the plaintiff's damages at $7,000."

The request for separate verdicts may come by a request for an instruction as to the form of the verdict, and if so it may come with the other instructions after all the arguments are closed, if that is the practice on instructions, and need not be put like special findings of facts before the arguments are commenced, even if that is the practice as to special findings.

In a special finding in the Illinois practice only a definite, ultimate question may be asked and one that can be readily answered by yes or no, though there are times when a question may possibly be asked that can be answered in some other way. It might be possible that the jury would be required to answer this question, "At what rate of speed was the train going at such a time and such a place?" Some courts allow this, and the jury might answer the rate of speed. This is a thing much discussed but which probably would not be deemed an ultimate fact. The ultimate fact would be whether the train was violating the speed ordinance, and the question can be put directly, "Was the train at the time indicated going in excess of thirty miles an hour?" that being the rate stated in the ordinance, and the jury will answer yes or no.

How to put instructions must be well under-

stood, especially by counsel for the plaintiff because if he gets a verdict he wants it to be sustained, and if his instructions are not accurate the verdict will be set aside either by the trial court or by the reviewing court. The advice is sometimes given that it is the safest thing for the plaintiff not to ask any instructions at all, which may be applicable where the plaintiff has a very strong case, one that is carried by the argument, but good cases for the plaintiff have been lost where the plaintiff offered no instructions and where the defense came in with a series of very strong instructions. The plaintiff's attorney made an able and convincing argument but the court practically made the last speech by reading the instructions, which seemed to the jury like a strong argument for the defendant. "Then and under such circumstances your verdict will be not guilty," or "This and that, A. B. plus C. D. and then your verdict will be not guilty." After the court had said this fifteen or twenty times the jury had forgotten nearly all the speech of plaintiff attorney and found for the defendant because, as a juror afterward when asked explained, "All the law was with the defendant, the judge told us everything for the defendant but the plaintiff had no law; how could we find for him?" If there are a few good instructions for the plaintiff—even if they cover

only the rules for computing the plaintiff's damages, when the jury read them they say, "Why, the plaintiff has a case here."

Of course if a lawyer does not know how to draw instructions it is better not to attempt them. He cannot always copy an instruction just because he has found it approved even by the supreme court, because sometimes the next case with the same instruction is reversed and if it is argued that it was approved of last year they may say that the point of objection that is now being argued was not at that time urged by the lawyers trying that case. So he must know the law when he deals in it or tries to apply it. The instruction in the particular case under the circumstances of that particular case may be a very sound one, whereas the same instruction in another case may be unsound.

Care must be taken in regard to the indirect effect of an instruction. In the railroad case for instance with the three counts in the declaration suppose there is no evidence at all about the speed of the train. The defendant's attorney is entitled to an instruction and if he asks it the court will give it, "The jury is instructed that there is no evidence sustaining the first count in the declaration." That is the count which relates to the violation of the speed law and therefore the jury is not allowed to con-

sider that count and cannot find the defendant guilty on that count. The defendant's attorney may think he has made a good move, but there is a doubt about its advisability because to ask the jury to throw out one count seems to them almost equivalent to acknowledging the defendant guilty on the other counts. The jury thinks, "The court throws out one count but doesn't that leave the other two counts?" These men were never in a court room before; none of them know what is understood by jurisprudence or a technical system of right and wrong. They are ordinary, commonplace men of only a general understanding and they draw the natural deduction that the exclusion of one thing assumes the inclusion of the other. At all events the defendant's attorney would have a good deal of trouble in explaining to the jury that merely because they are told not to find on the first count it does not follow that they must find on the second and third; that it means only that those are open for argument and that he now proposes to argue and show them that they should not find on the second or third. He has assumed an extra burden.

Possibly this would be the solution of the difficulty. When the defendant asks for and gets the instruction that the jury cannot find on the first count, there being no evidence, it might be well for the defendant to ask another instruc-

tion—though it is not certain that he is entitled to it—that the mere fact that the court has instructed the jury that there is no liability as to a certain count in the declaration does not imply that there is or is not a liability on the other counts. It means simply that those counts are still for the consideration of the jury under the evidence and the law as given in the instructions.

The plaintiff should ask an instruction as to the amount of the damages. The defense should ask an instruction that no damages can be recovered except through a preponderance of the evidence and can always obtain another instruction, namely: that the fact that the court has advised them how to compute damages does not imply that they must give damages, that it is merely the way to estimate the amount, and that the jury must still determine from the evidence and the other instructions whether there is or is not any guilt at all in order to get to the point where they could give damages. Without that secondary instruction the jury often thinks that because they are informed as to how to compute the damages all they have to do is to go out and compute the damages. They take that instruction as an indication of liability.

A pertinent case on special findings was a recent suit on an insurance policy. The deceased

was found dead, shot through the head. If he was sane when he killed himself the policy could not be collected, but if he was insane he was not responsible for killing himself and the policy could be collected. Only in case he was sane and killed himself could the policy not be collected. There the special findings would be, "Was the man sane?" "Was he killed by the accidental discharge of the gun?" Six jurors might believe that he was insane and that would induce them to vote for the plaintiff. Six other jurors might believe he was perfectly sane but that his death was an accident, and that would induce them to vote for the plaintiff. At all events in such a case special findings should be asked. The defense requires all twelve of the jury to unite on one proposition and by asking for special findings the defense compels them to do so, or to disagree. In this case the defendant's attorney failed to ask for a special finding and the jury went out and found for the plaintiff though as was afterwards shown the twelve jurors did not get the same idea or act from the same motives.

The subject of peremptory instructions may be considered, by which is meant that when the plaintiff has put in his case and the defendant believes that the plaintiff's evidence does not make a case at all the defendant asks the court

at that point to instruct the jury in a peremptory manner to find for the defendant. It is not always advisable to ask that instruction at the end of the plaintiff's case. Of course if the defendant's own testimony is of such a nature that there is danger that some of the points which it may develop may strengthen the plaintiff's case it is well for the defendant to ask for the peremptory instruction at the end of the plaintiff's case; but if there is no danger that the defendant's testimony may aid the plaintiff and if it is altogether towards defeating the plaintiff's case, then it is the part of wisdom not to ask for the peremptory instruction until the end of the defense for the following reason. At the end of the plaintiff's case the judge, though it seems to him that the plaintiff has no case, is in doubt; it is an arbitrary action for him to take a case from the jury, to interfere with the function of the jury and to direct them what their verdict shall be. So although the plaintiff's evidence may be weak the judicial intellect balances in favor of the rights of the jury and the judge is very apt to refuse the instruction, to say, "The plaintiff has enough case here to go to the jury," and to require the defendant to go on with his defense. Furthermore, in some jurisdictions, as soon as the defense goes on with its case, it waives the right to object in the review-

ing court or to raise as error in the reviewing court the action of the trial court in refusing the peremptory instruction. So the defense has gained nothing by the refusal and cannot even claim it as an error in the reviewing court. On the other hand the defense has compelled the court to exercise his judicial intellect against the defense and as a psychological fact it is difficult for him afterwards to come back and say that there is no case for the plaintiff; whereas if the court had not been asked at that point for a peremptory instruction but had heard a strong, convincing defense the judicial intellect, which was already wavering at the end of the plaintiff's case would be carried clear for the defense and the judge would instruct for the defendant.

Again if the motion is asked at the end of the plaintiff's case and denied, the jury gets the idea that the court thinks there is a case for the plaintiff and they will carry that impression to the end. Even though the jury is excluded from the court room while the matter is being argued they may know exactly what is going on because they are in attendance at the court and have been in the room while other similar cases were being argued.

There is one more point against asking for peremptory instructions too soon. Suppose the defendant is very fortunate and at the end of the

plaintiff's case the motion is granted. The court instructs for the defendant, there is a verdict and judgment for the defendant. The plaintiff's evidence has all been preserved at that point. The case then goes to the upper court, is reversed and comes back for a new trial. The plaintiff's evidence has been taken and can be used again though his witnesses may be gone, but the defendant's evidence has not been taken. So as a mere practical safeguard the defendant should be glad to put his evidence in and then ask for a peremptory instruction for the defense. Then if the case goes up and is reversed and if, as sometimes happens it comes back five or six years afterwards to be tried over again the defense is on an equal footing with the plaintiff.

The objections and the exceptions in the various practices must be learned from the books. If the opponent has instructions which are not satisfactory the practice differs very greatly. For instance in some courts the exceptions must be filed and the motion for a new trial argued and if it is shown that the opponent's instructions are wrong a new trial can be obtained. In other courts the exceptions to the instructions must be taken before the jury leaves the room. The opposing counsel must listen to the instructions, then step to the bar and object to them

before the jury retires to consider of their verdict, this gives the court an opportunity to correct the error immediately; if the attorney fails thus to object he waives the error.

CHAPTER XIV.

THE ARGUMENTS.

SIMPLE, direct language should be used in the arguments. It must be remembered that the jurors are seldom men of more than average mentality and that intricacies of speech and rhetoric tend only to confuse them and becloud in their minds the main issues. As a general rule the less pretentious and erudite the English employed, the more convincing and effective will the arguments be. A few other suggestions may also be offered which though not invariably applicable will be found advantageous in the great majority of instances.

If suppositions are made the supposition must be complimentary not derogatory to the audience. Assuming that the accused committed a forgery or stole a horse or beat his wife it is not well to say, "Gentlemen of the jury if one of you should be charged with beating your wife," or "If one of you should be accused of committing a forgery," but it is better to say, "If one of you jurors should see a man beating his wife." Jurors are very easily offended by tactlessness in that regard.

As a mere matter of policy it is best to be honest with the jury for they are quick to detect sham. The fundamental principles of right and wrong that they all can understand must be adhered to. If there is an exception upon which the advocate relies he must see that the jury clearly understands it. If, for instance, he relies upon the statute of limitations he must see that the jury understands that there is reason and justice in the statute of limitations. Otherwise they will think it merely a shrewd technicality and will disregard it.

In many jurisdictions the time for argument is greatly limited. The court has been known to limit the argument in which the death of a human being was involved, to ten minutes on each side, although it was undoubtedly an outrageous thing to do and would perhaps have been found to be error. But in such a case necessarily time must be spent only on the essential points and those of less importance must be omitted.

Much has already been said about the advantage of having the closing speech. If a lawyer has not the last speech he must anticipate what his opponent will say in answer and he must be careful to leave no vulnerable points and especially careful to say nothing which may be subjected to ridicule. If a speech is successfully

and properly ridiculed by the opponent's last speech the entire effect of the argument has been lost upon the jury. Of course the lawyer who has the last speech may take more liberty because there is nobody to contradict him, nobody to expose the fallacy of his argument, but even then he must be fair because if he is unfair the jury will notice it and if they think that he is trying to advance an unjust argument they probably will defeat him.

It must not be forgotten either that the position which has the first and last evidence and consequently the first and last speech has also a corresponding burden, namely the burden of proof. The jury will be instructed to this effect and the opponent will probably lay much emphasis upon it. He will insist with great vehemence that the plaintiff has the burden of proof, and he must sustain it by a preponderance of the evidence, which frequently impresses the jury greatly, and he will reverberate the word "pre-pon-der-r-r-ance" adown the corridors of the Court House, as though the very term itself weighed a ton.

But this "preponderance of the evidence," and "the burden of proof," is not an alarmingly serious matter because as has been already indicated, where much sympathy is with one side or the other, the jury does not as a rule stop to

count witnesses or to nicely weigh their evidence. They act upon their general convictions of the abstract right in the case. So it is well to claim the first and last speech even subject to the apparent burden of the preponderance of the evidence. It is a double advantage if the opponent has the burden of proof, in an affirmative defense for instance, and the plaintiff can still keep the first and last speech.

Even the lawyer with the last speech, however, must anticipate that the court is going to charge the jury, and in general what he will say. For instance an instruction is very apt to be given that preponderance of the evidence depends not alone upon the number of the witnesses but upon the credibility of the witnesses and other circumstances in the case. That is a very important instruction for a lawyer who happens to have two witnesses against his opponent's six and he should not only see that it gets into the case but should argue upon it and impress upon the jury the reason why the two witnesses may be as strong as the six. The jury generally pays attention to the utterances of the court because they understand that the court is impartial and is endeavoring to do his duty to both sides.

The argument should be emphatic when needed but not emphatic throughout. Many

speakers make themselves tiresome by continual over-emphasis. Jurors have been heard to complain that they were tired out by the lawyer's shouting. The general argument should be in an ordinary conversational tone with emphasis only on the important points. Unjust abuse on the part of a speaker, either of the opponent's lawyer or of the witnesses or of anyone else usually results only in raising sympathy for the object of abuse in the jury. But if rebuke is merited so that there is not the slightest doubt of its justice it should be given emphatically and directly. Even then the retaliatory possibilities of the last speech must be considered because, no matter how just the chastisement, if the opponent follows he may be able to put the matter in such a light as to make it appear that a victim has been undeservedly abused. Even when a rebuke is called for it is seldom safe to reprimand one who will inherently arouse sympathy, for instance, a cripple or a woman, or even a drunkard.

Frequently the advice is given a lawyer to address himself to one juror, to pick out one strong man in the jury box and convince him beyond question, relying upon him to carry the other jurors. It is barely possible that this is a good plan for the defense to follow because it may result in a hung jury, but as a general rule

it is not advisable for the plaintiff, for even if that one man is convinced and made the advocate with the jury it will make the other jurors jealous, feeling that they have been slighted and the chances are that it would do more harm than good. The plaintiff must have the whole twelve jurors and not one.

Care must be taken not to couple a weak argument with a strong one. If a weak argument and a strong one are joined the opponent will cast ridicule upon the weak argument to such an extent that the jury will ignore the strong one. They will forget it and in a general way get the impression that the entire speech and that side of the case are weak. If there is a good, clear, strong point that and nothing else should be insisted upon and emphasized to the jury. They will take that with them into the jury room and even if the opponent has the last speech he will not be able to overcome it. But if two arguments are put in, a strong one and a weak one, the opponent will gloss over the strong one and emphasize the inaptness of the weak one until the jury will retire to the jury room with the impression that that side of the case has no argument at all.

In the main part of the argument where time permits a general outline should first be given of the matter to convince the jury of the gen-

eral principles of right on which the claim is based. Then the particular facts and law of the particular contention should be applied. They must first be given a clear idea that what is asked for is just in order to prepare the ground for the subsequent argument.

In criminal cases for instance the defendant's attorney may with profit dwell upon the constitutional guarantees which surround the accused, upon the fact that the prosecution must prove guilt beyond a reasonable doubt and upon similar propositions, explaining the importance of each and showing that they are not merely technical but also equitable. The prosecution on the other hand will dwell upon the necessity of administering and enforcing the law as the only means of protecting the public in property and in person.

In a will controversy the contestants may speak of the injustice of disinheriting the wife or children who have by a lifetime of assistance, of self-denial and economy aided the testator in accumulating the estate, while the proponents on the other hand may dwell upon the importance of the power of disinheriting. They will show that it stands as an inducement to the direct heirs to treat the testator kindly and properly, if not actuated by affection at least under fear of disinheritance, for filial gratitude and devo-

tion alone are not always sufficient to insure respect and attention.

To a layman, particularly the small wage earner the demand by a plaintiff for a brokerage "commission" of a large amount, say $50,000, especially where the negotiations were carried through in a comparatively short period seems so enormous that his mind must be thoroughly prepared in advance for a comprehension of the merits and the justice of the demand. It should be pointed out to him that a broker is not like a merchant or a professional man; that these have a somewhat steady stream of daily business, the moderate profits from which pay the current expenses and yield the net profit. But the broker, while under a similar current expense may have but an occasional success in his negotiations and long periods must intervene in which he has no income whatsoever, hence the necessity and consequently the justice of the larger compensation on the successful negotiation. Moreover, the party who benefits from the broker's efforts is in this way and this way only enabled to find a market at perhaps a very great profit for his large holdings. Unless he were through the agent to dispose of them or even to carry them further, he might be deprived of them at a ruinous sacrifice.

The contestant who has the closing speech

should first demolish his opponent's argument and get it out of the way, and then build up his own argument so that the jury will retire with the strength of it the last thing in their minds.

When one has the intermediate speech, as has been said before, he must anticipate everything that his opponent is apt to say so that the jury will have some answer to it when he does say it. In addition he must call attention to the fact that the opponent does speak last and of the great advantage that this gives him. As the great majority of humanity loves fair play the jury should be given to understand that it would have been the part of fairness for the opponent to have advanced in his first argument every proposition that he expects to advance in his last argument and that it would not be fair for him in his last speech to advance any argument to answer which no opportunity is given.

Every phase of the case that the opponent advances should be covered. No point should be left unanswered or unprotected because sometimes even a very small point that may seem trivial may have its effect upon either the whole jury or upon some member of the jury. If it is trivial its weakness should be shown.

At all times it must be borne in mind that mere abuse is not argument, mere rhetoric is not reason, and that eloquence is not evidence.

They may all be very useful but the substantial frame-work and foundation of the case must be argument, reason, and evidence.

Where there is a sharp conflict of evidence the lawyer must by summary show that his own evidence is most consistent with the possibilities or the probabilities, or the actualities of the case. Of course that line of evidence is most convincing which is fully in accord with the conceded circumstances. Next comes the probable and last the possible.

One of the most skillful moves in a case is to harmonize everything as much as possible. It is much easier to swim with the current than against it. So the lawyer must try to turn so much of the evidence as he can into the channel leading to his side of the case rather than try to oppose it.

The jury is more apt to believe witnesses if they want to believe them. The lawyer must, therefore, lay such a train of logic as will predispose the jury in favor of his client and witnesses. Take, for instance, a suit where the city has dug a tunnel to bring water into the city and in the course of the work has done an injury which results in a suit for damages. The plaintiff is a tradesman and his lawyer will show how his business was interrupted and will develop to the jury the importance of protecting a man in his

industry. He will assert that his family is dependent on his success, that he wants to rear his children to be self-supporting and that it is for the benefit of the public as a whole to protect every man in his business and that hence there should be compensation to the plaintiff for the damage done. This will be effective and the jury will probably give damages because they feel that it is only right and just. The defendant's lawyer on the other hand in his speech will tell about the importance to all citizens of a pure water supply and the necessity of allowing the city to dig the tunnel and to dig it with economy without being swamped with debts. He will try to persuade the jury that damages should not be awarded against the city on that account.

Again the city is liable under the law if it allows a mob to do any damage. The property owner's lawyer advances the same argument that has just been given. On the other hand the city attorney, defending the suit, urges the hardship to the city if heavy damages should be given. He contends that each individual should take care of himself and thus prevent mobs.

In questions about master and servant, whether or not the master is liable for an injury to the servant the attorney on the one side will show how the servant must be protected; he is dependent upon his industry and he ought to have pro-

tection of life and limb while he is at work. On the other hand the attorney for the employer will show how the employer himself is dependent upon the servant's care; how the carelessness of the servant or of his fellow servant may not only injure his master's business but may injure the entire community; it may result in a boiler explosion or similar catastrophe in which many innocent people are killed. The attorney for the master should explain to the jury that it is important for the servant to be held to these rules.

In other words one sympathy must be overcome with the opposite sympathy; one general trend of justice with the opposite trend of justice. Each one must exert himself in his own direction. Nothing appeals more strongly to the jury than the very common case of a child that has been injured by a railroad train. Of course the general sympathy is at once raised for the child, ruthlessly run down by the train and the jury is more than ready to find for the child. On the other hand the defendant will bring out that the train was carrying people who were travelling; that people must travel and that railroad service is a beneficent institution. One of the passengers might be hastening to a sick bed; another one may be hurrying home to attend to some important industry; a physician might be hurrying to the bedside of a person who needs

his immediate attention. The train is going rapidly in response to a public demand for speed. This is the justification which overcomes to some extent the idea of a train as a ruthless and destructive monster, and at least gives the defendant some chance before the jury.

Another difficult position for the plaintiff is that of a bank suing on a note against some small tradesman; the attorney for the small debtor pleads that he should not be burdened with this unjust debt, assuming some defense or other. The attorney for the bank however starts in by saying that he feels as though the jury has a general idea that the bank is a corporation which grows rich upon the industry of people, but he passes on to the justification of a bank. He brings out the fact that trade could not continue if it were not for banking facilities, that tradesmen themselves are dependent on banks, and the smaller the tradesman the more necessity for a bank. He must deposit his money and the safety of the banks is of the utmost importance to these small tradesmen. But the bank cannot be safe and strong unless the jury protects it in its right; sees that when it lends out money it gets the money back again, and so on.

There are strong natural equities which are developed on one side of the case or on both sides. One of the strongest natural appeals is

what is called a common-law marriage, especially where there are children born of the union. A woman claims that a man is her husband though no marriage ceremony was solemnized. The jury is more than eager to sustain the marriage, more than eager to sustain the children as legal and legitimate. In a case of that sort a very strong counter argument would be required for the defense.

Again, a will may seem unreasonable and unjust in its terms. The parents have left a considerable estate, in the accumulation of which the sons have helped in the business and the daughters in the household. If it is found that the father has willed all his property to strangers or perhaps to distant relatives or even for a commendable charitable purpose it strikes the jury as unreasonable for the man to ignore his own flesh and blood and they are ready, when that is pointed out to them, to follow the natural equity and defeat the will if there is the slightest chance to do it. They will ignore the weight of the evidence and the preponderance of the evidence and everything else if possible in favor of natural equity and therefore it is the duty of the lawyer to point this out to them.

Criminal cases have their natural equities on each side very strongly marked. Sometimes the only defense is the reliance upon constitutional

privileges or upon the common law that the defendant must be not only found guilty but must be found guilty beyond a reasonable doubt. Sometimes the jury may think that that is only a shadowy thing and it is the lawyer's duty to emphasize its importance.

In regard to insurance again the jury may think that the clauses in a policy are very severe and technical and that they should not be enforced against the plaintiff who has suffered a loss by fire; or by accident or death, if it is a life insurance matter. The advocate for the defendant company may then remind the jurors of what is very apt to be the case, that some of them are themselves component parts of insurance companies for in nearly every jury will be found a number of men who belong to some brotherhood or society, to the Knights of Pythias, United Workmen, or to one of the organizations of that sort which are to some extent insurance societies. He may request them when they go home to read their policies which are the constitutions and by-laws and they will be found a great deal more technical than the clauses in this policy. So they begin to see that these clauses are necessary to protect the funds of such a society against unjust and improper claims.

Apt allusions and imagery are very helpful in

argument and a practitioner does well to store his mind with material for that purpose which he may gain from reading history, science, metaphysics,—from nearly everything. The day of the jury advocate has passed in which the legal giants of the old school would argue for days about a case involving a hog or a coat, and use every power of pathos, ridicule and oratory in establishing their side of the case. Time is limited now, and brief, emphatic arguments must be employed, but apt illustrations and quotations may still be used if they are short and strong.

Shakespeare is an abundant source of illustration; the Bible an even greater one. In arguing a case for a laboring man the jury may be reminded that he who sows the seed is entitled to a share of the harvest, a doctrine as old as Holy Writ and universally acknowledged as just.

As a simile for slander the old tale may be told: that one found guilty of slander was ordered by the judges to go to the top of a tower with a handful of thistle down which he must allow the wind to blow away, and then as a penalty ordered to go down and pick each fibre up again. Defamatory words which are spoken or printed are scattered to the four winds of heaven and it would be an impossible task to recall them, to pick them up and bring them back. Not only

that, but they are a very noxious seed which produces a prolific crop.

To impress upon a jury the extent of a client's sufferings from an injury is a simple enough matter where the injured party sits before the jury with his hand sawed off and with the unsightly stump of an arm protruding. It does not take much argument in a case of this sort, but there are injuries quite as grievous though not so apparent, which the untrained intellect, not only of jurors but of judges, will fail to appreciate unless their imaginations are stimulated. For instance the affliction of insomnia or impaired sleep as the result of an accident must be brought home to the jury in some effective way and Shakespeare may avail—

"The innocent sleep;
Sleep, that knits up the ravell'd sleeve of care,
The death of each day's life, sore labor's bath,"

or

"Balm of hurt minds, great Nature's second course,
Chief nourisher in Life's feast."

In damage suits the plaintiff's lawyer must not forget to let the jury know something about the amount of damages that he thinks his client is entitled to because if he does not allude to that

and demonstrate to them how they may compute the amount they may not come to any satisfactory conclusion in the matter.

It is wise to harmonize apparent controversies whenever possible, to try to make the jury understand that both sides want the same outcome. Take for instance the case of the husband who is suing his wife for adultery. It may readily be argued by the defense in such a case that both sides want the defendant to win. Certainly the wife wants to win to vindicate her name and the complainant wants the defendant to win to prevent his own children from going through life disgraced. The jury are told that the husband would be only too glad to find that he had been misinformed or mistaken and that he would be the first to welcome a verdict of not guilty and to know that his wife was innocent. Under these circumstances the jury would find for the wife if they possibly could. They would reason, "Of course we are glad to tell this man that his wife is innocent and to remove this cloud from the family." It would require a very strong case against the wife for the jury to overcome that argument.

Suppose in another case the husband is on trial accused of murdering his wife and his defense is that she committed suicide. The counsel for the accused will here plead how much more con-

soling it is for the children to retain the father's care rather than to have him executed and be deprived of both parents; to retain the father's good name rather than be branded as the children of a murderer; and to assume that this poor woman in a demented condition, for which nobody is responsible, killed herself. There are indeed cases and this unfortunately may be one of them, where guilt is so clear and unmistakable that the jury must find the defendant guilty; but the duty of the advocate is plain, he must make use of whatever material he has.

Quite a common occurrence is a suit on a fire insurance policy in which the fire insurance company claims that the party set the property on fire himself. The company's lawyers will say in a magnanimous spirit in order to gain favor with the jury, that the company does not care very much for the amount but that they nevertheless must insist upon an example being made in order that such crimes may not become too prevalent. The plaintiff's attorney answers, "Of course the defendant does not care about this small amount of money and therefore a verdict for the plaintiff will make both sides happy," and with a right argument and a slight amount of evidence the jury will find against the insurance company if it can be shown that the client

has paid his premiums and is entitled to be protected when disaster comes.

In cases of great moment, cases involving the trial of life and death the prosecutor must work the jury up to the point where it will do its duty. Humanity is exceedingly reluctant to deprive a fellow being of life and a jury is very slow to find the accused guilty of murder and condemn him to death unless the jurors are worked up to the point where their duty is unmistakable. The prosecution will call their attention to the rule in the old Greek trilogy which has existed for untold time. "Blood for blood and blow for blow. Thou shalt reap as thou dost sow," or will appeal to Scripture "An eye for an eye, a tooth for a tooth," or again "Whoso sheddeth the blood of man by man shall his blood be shed," which has stood the test for six thousand years. The interest of the juror must be lifted to that height where he can disregard individuality and give his attention only to doing his full duty regardless of any consequence or any sentiment.

But the defender in the intermediate speech should anticipate this last speech, and in a measure provide against it. He should caution the jury that they must be dispassionate, that they must not allow themselves to be worked up into a fury by the mere heinousness of the offense because it would only be a double wrong if the

jury should make an innocent person suffer. He should remind them that even if crime was committed the safety of society requires only a punishment commensurate with the offense and nothing more; that it is not their province to thirst for blood or to do vengeance. They are not there to execute someone simply because an offense has been committed but to investigate and to see beyond a reasonable doubt where the guilt is. He also should remind them of the biblical injunction "Vengeance is mine, I will repay, saith the Lord," which is some check against their being swept to extremes by the last stirring speech of the prosecution.

So each case has its own illustrations and in each case something may be said in a general way of what has been called natural equity which may be developed by the plaintiff's attorney on the one side or brought to the attention of the jury by the defendant's attorney on the other side.

The admonition must be repeated that what has in any instance been said is not to be regarded as a rule to be unvaryingly adhered to but only as a suggestion to be worked out and made applicable to the particular case.